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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1928 1930

No. 576 5

INDIAN MOTOCYCLE COMPANY

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

FILED DECEMBER 11, 1928

(33,885)

(33,885)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 576

INDIAN MOTOCYCLE COMPANY

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 17, 1928

[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

DECEMBER TERM, 1927

No. H-49

INDIAN MOTOCYCLE COMPANY, a Corporation, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant

Mr. Monte Appel, with whom was Mr. Frederick Schwertner, appeared for the plaintiff.

Mr. Herman J. Galloway, Assistant Attorney General, and Mr. Fred K. Dyar appeared for the defendant.

Before Chief Justice Booth, Judge Moss, Judge Green, Judge Sinnott

STATEMENT OF CASE

The Court of Claims of the United States hereby certifies that the record of the above-entitled case now pending before it discloses the following:

The Indian Motocycle Company of Springfield, Massachusetts, duly filed its petition in the Court of Claims on the 9th day of February, 1927, praying judgment against the United States for $13.83 with interest, as will more fully appear from the petition, a copy of which accompanies this certificate as Exhibit A.

An agreed statement of facts was made by counsel and attorneys representing the respective parties which was filed in the Court of Claims on the 16th day of May, 1927, and is set forth herein. This case came on for trial in the [fol. 2] Court of Claims on October 2, 1928.

There being a division of the court in this case and the court being in doubt, we are of the opinion that the case cannot properly be disposed of without certifying to the Supreme Court certain questions of law involved therein concerning Section 600, Subdivision (2) of the Revenue Act of 1924, and receiving the instructions of said Supreme Court thereon.

Said provision of said Revenue Act is as follows:

"Sec. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentage of the price for which so sold or leased——

"(2) Other automobile chassis and bodies and motorcycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and the body."

For the purpose of certification we state the facts to be as follows:

AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed by and between the parties to the above-entitled action that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The plaintiff is a corporation duly incorporated under the laws of the Commonwealth of Massachusetts on or about October 4, 1913, with its principal office and place of business in the City of Springfield, Massachusetts.

2. On or about June 16, 1925, the plaintiff sold and delivered to the City of Westfield, a municipal corporation created by the Commonwealth of Massachusetts, one Indian Motocycle, and the invoice covering the sale showed [fol. 3] the following:

1 Indian Motocycle, Model GE, Motor No. 57 Y 304, Tires Balloon	$247.50
Max Hand Lum. Dial Speedometer Net	16.00
Extra Chief Ammeter and Switch and Horn	6.00
Net Extra Balloon Tires, Net Extra	2.00 5.00
Amount of Tax	13.83
	290.33

EXHIBIT "A" TO AGREED STATEMENT OF FACTS

INDIAN MOTOCYCLE COMPANY

FORMERLY KNOWN AS HENDEE MANUFACTURING COMPANY

SPRINGFIELD, MASS. U. S. A.

CABLE ADDRESS, INDIANS SPRINGFIELD, TELEPHONE CONNECTION, A. B. C. FIFTH ED., A. B. C. FIFTH ED. WESTERN UNION, MOSELEY'S, LIEBER'S, LIEBER'S 92

MAKE ALL REMITTANCES PAYABLE TO INDIAN MOTOCYCLE CO.

JUNE 16TH 1925

SOLD TO WESTFIELD POLICE DEPARTMENT
WESTFIELD MASS.

[redacted]

QUANTITY	FACTORY ORDER NO. G 2867	CUSTOMER'S ORDER 6525	LIST	NET	TOTAL
A 1	Indian MOTOCYCLE, MODEL CE MOTOR NO. 57Y304 TIRES BALLOON			247.50	
B	" MAX HAND LUM. DIAL SPEEDOMETER NET			16.00	
C	" EXTRA CHIEF AMMETER & SWITCH & HORN			6.00	
D	" SIDE CAR, SERIAL NO NET EXTRA BALLOON TIRES NET EXTRA			2.00	
E	" BICYCLE MODEL SERIAL NO			5.00	
F	AMOUNT OF TAX			13.83	$ 290.33

SHIPPED VIA DELIVERED

TO

MARKS FOR WESTFIELD POLICE DEPT.

EXHIBIT "B"

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

TREASURY DEPARTMENT
Internal Revenue Service
Form 843 (Rev.)
Commissioner General, U. S.
January 10, 1925

IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☒ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

COLLECTOR'S NOTATION
District
Amount number
Date received
Collector of Internal Revenue

State of MASSACHUSETTS
County of HAMPDEN } ss:

NOTICE TO COLLECTOR
Collector must indicate in block given the kind of claim, except in Income Tax cases.

Date received by Collector of Int. Rev.
Stamps here

TYPE OR PRINT

INDIAN MOTOCYCLE COMPANY
(Name of taxpayer or purchaser of stamps.)
837 State Street
(Residence (or place of business) and number or street, city or town and State.)
Springfield, Massachusetts.
(Residence entered.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

PERIOD	YEAR
From June 1,	19 25
To June 30,	19 25

1. Business in which engaged Manufacture and sale of motorcycles
2. Character of assessment or tax Excise Tax
(State for or upon what the tax was assessed, or the stamps affixed.)
3. Amount of assessment or stamps purchased ... $
4. Reduction of Tax Liability requested (Income and Profits Tax) ... $
5. Amount to be abated ... $
6. Amount to be refunded (or such greater amount as is legally refundable) ... $ 15.65
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) July 29, 1925
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed Boston, Mass.
9. District in which unpaid assessment appears
10. Amount of overpayment claimed as credit ... $
11. Unpaid assessment against which credit is asked; period from ... to ... $

Deponent verily believes that this application should be allowed for the following reasons:

That the aforesaid tax of $15.65 was paid on the sale of one Indian Motocycle to the City of Westfield, a municipal corporation of the State of Massachusetts, as evidenced by copy of invoice attached;

That said Motorcycles was bought by the City of Westfield for use in the performance of police duties, and was so used;

That it is contended the regulations making taxable sales of motorcycles to municipalities for use in performing their governmental functions are invalid and in contravention of the Federal Constitution.

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 29th day of November, 1926

James E. Meskell
Notary Public.
My Commission expires Sept. 15, 1933.
(Title.)

INDIAN MOTOCYCLE COMPANY
Signature: By: Parnly Hanford
Treasurer.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

A true copy of said invoice is attached hereto and made a part hereof by reference, marked Exhibit "A." The invoice of the Indian Motocycle Company was paid by the City of Westfield out of public moneys by its check No. 22171, dated July 6, 1925, in the sum of $290.33, representing $276.50, the price of the motorcycle, and $13.83, the tax equivalent to 5 per centum of the price for which so sold.

(Here follows Exhibit "A" to Agreed Statement of Facts, marked side folio pages 3-a and 3-b)

3. The purchase of said motor-cycle was authorized by the City of Westfield for police purposes, and said motor-cycle was used at all times exclusively for police purposes.

4. Under the provisions of Subdivision (2) of Section 600 of the Revenue Act of 1924, the Commissioner of Internal Revenue assessed a tax equivalent to 5 per centum of the price for which said motor-cycle was sold, or $13.83, and the plaintiff paid the same to the United States on July 29, 1925.

5. On or about the 29th day of November, 1926, the plaintiff filed a claim for refund of the above tax in the sum of $13.83 with the Commissioner of Internal Revenue, a true copy of which is attached hereto and made a part hereof by reference, marked Exhibit "B," on the ground that "the regulations making taxable sales of motor-cycles to municipalities for use in performing their governmental functions are invalid and in contravention of the Federal Constitution," but the claim was wholly disallowed by letter of the Commissioner of Internal Revenue dated January 17, 1927, as follows:

"Reference is made to the claim filed by you for refund of $13.83, manufacturer's excise tax alleged to have been erroneously paid for the month of June, 1925.

"You state that the aforesaid tax of $13.83 was paid on the sale of one Indian Motocycle to the City of Westfield, a municipal corporation of the State of Massachusetts, which was bought by that city for use in the performance of police duties and was so used.

"You contend that the regulations making taxable sales of motorcycles to municipalities for use in performing their governmental functions are invalid and in contravention to the Federal Constitution.

[fol. 4] "You are advised that section 600, subdivision (2), of the Revenue Act of 1924, imposes a tax equivalent to 5 per cent of the price for which motorcycles (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith, or with the sale thereof) are sold or leased by the manufacturer, producer or importer.

"This office holds that the tax applies to the manufacturer's sale of articles enumerated in section 600, subdivision (2) of the Revenue Act of 1924, when sold to the United States Government or to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operations. This holding is in conformity with an opinion rendered by the Attorney General under date of July 7, 1919 (31 Ops. Att'y Gen. 521) relative to taxes imposed by the Revenue Act of 1918 corresponding to the tax imposed by section 600 (2), Revenue Act of 1924.

"Your claim is accordingly rejected."

6. The plaintiff has always borne true allegiance to the Government of the United States, and has not in any way aided, abetted or given encouragement to rebellion against said government. It has not made any transfer or assignment of said claim or any part thereof, and is the sole and absolute owner of the same.

The contention of the plaintiff is that the motorcycle was sold to a political subdivision of a State for use in carrying on its governmental operations and was not subject to tax under said Section 600, subdivision (2) of the Revenue Act of 1924.

The defendant contends that the tax herein was an excise tax imposed upon the sale of the motorcycle by the plaintiff company, which sale is strictly within the application of the taxing act, and that the fact that the motorcycle was purchased for use by a municipality does not relieve the article from the tax.

Under these circumstances this court being divided and being in doubt desires the instructions of the Supreme

Court upon the following question, a decision on which is [fol. 5] deemed indispensable to a proper disposition of this cause now before it and a proper discharge of the court's duties herein.

QUESTION CERTIFIED

Question. Where a motorcycle is sold by a private corporation to a municipal corporation of a State and the purchase of said motor-cycle was authorized by said municipal corporation for police purposes, for which said motorcycle was at all times exclusively used, is said transaction within the provisions of Section 600, Subdivision (2) of the Revenue Act of 1924 (43 Stat. 322) and the decision of the Supreme Court in the case of the Panhandle Oil Company v. the State of Mississippi, decided on May 14, 1928, 277 U. S. 218, and taxable thereunder?

It is respectfully requested that the Supreme Court of the United States give appropriate instructions on the above question, certify and transmit the same to the Court of Claims of the United States for its guidance in the further progress of the cause.

Fenton W. Booth, Chief Justice; McKenzie Moss, Judge; Wm. R. Green, Judge; N. J. Sinnott, Judge; the judges who sat on the hearing of the case.

[fol. 6] CLERK'S CERTIFICATE

I, J. Bradley Tanner, Chief Clerk of the Court of Claims of the United States, do hereby certify that the foregoing certificate in the case of Indian Motocycle Company, a corporation, v. the United States of America, No. H-49, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof I hereunto subscribe my name and affix the seal of the Court of Claims of the United States, at my office in Washington, D. C., this 1st day of December, 1928.

J. Bradley Tanner, Clerk Court of Claims of United States. (Seal Court of Claims.)

[fol. 7] EXHIBIT A

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. H-49

INDIAN MOTOCYCLE COMPANY, a Corporation, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant

PETITION—Filed February 9, 1927

To the Honorable the Court of Claims:

The plaintiff respectfully represents:

(1) The plaintiff is a corporation duly incorporated under the laws of the State of Massachusetts on or about October 4, 1913, with its principal offices and place of business in the City of Springfield, State of Massachusetts.

(2) During the time hereinafter mentioned, there were in effect certain provisions of Section 600 of the Revenue Act of 1924, which provisions were as follows:

* * * "there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

[fol. 8] (1) Automobile truck chas-is and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. A sale or lease of an automobile truck or of an automobile wagon shall, for the purpose of this subdivision, be considered to be a sale of the chassis and of the body;

(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or

lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and of the body;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. This subdivision shall not apply to chassis or bodies for automobile trucks, automobile wagons, or other automobiles."

(3) Pursuant to the provisions of said Act, the Commissioner of Internal Revenue with the approval of the Acting Secretary of the Treasury on August 29, 1924, promulgated Regulations 47 relating to the Excise Taxes on [fol. 9] Sales by the Manufacturer under Section 600 of the Revenue Act of 1924, which regulations provided in part as follows:

"Art. 10. Sales to the Government or a State.—The tax applies to articles enumerated in section 600, except those enumerated under subdivision 6 (see art. 19), when sold to the United States Government. The same is true of articles sold to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operation. When the Government supplies a manufacturer with all material and parts, except a small portion furnished by the manufacturer under a contract stipulating that the manufacturer shall be guaranteed a certain profit, no tax is payable. Articles manufactured for Government use in plants taken over and operated by the Government are not subject to tax. The rules applicable to the taxability of sale to the United States Government apply equally in the case of articles sold to foreign governments. (See also art. 19.)"

(4) On or about June 16, 1925, the plaintiff sold and delivered to the City of Westfield, a municipal corporation created by the sovereign State of Massachusetts, one Indian Motocycle, and the invoice covering the sale showed the following:

[fol. 10] 1 Indian Motorcycle, Model GE Motor No. 57 Y 304, Tires Baloon 247.50
Max hand lum., dial speedometer, net 16.00
Extra chief ammeter and switch and horn 6.00
Net extra balloon tires, net extra ..... 2.00 / 5.00
Amount of tax 13.83

$290.33

(5) The purchase of said motorcycle was authorized by the City of Westfield for police purposes, and said motorcycle was used at all times exclusively for police purposes, a governmental function. The invoice of the Indian Motorcycle Company was paid by the City of Westfield by its check No. 22171, dated July 6, 1925, in the sum of $290.33, representing $276.50, the price of the motorcycle, and $13.83, the tax equivalent to 5 per centum of the price for which so sold.

(6) On July 29, 1925, the plaintiff paid to the United States the sum of $13.83 as taxes levied, assessed, collected and paid under Section 600 (2) of the Revenue Act of 1924 on the sale of said motorcycle to the City of Westfield.

(7) The tax in the sum of $13.83 on said motorcycle was erroneously and illegally levied, assessed, collected and paid, for the reason that that part of Article 10 of Regulation 47 imposing said tax upon articles sold to a state or political subdivision thereof, even though they are paid for entirely out of public moneys and are used in the carrying on of governmental operation, is in contravention of the [fol. 11] constitution of the United States and is null, void and of no effect.

(8) On or about the 29th day of November, 1926, the plaintiff filed a claim for refund of the above tax in the sum of $13.83 with the Commissioner of Internal Revenue, and the claim was wholly disallowed by letter of the Commissioner dated January 17, 1927, as follows:

"Reference is made to the claim filed by you for refund of $13.83, manufacturer's excise tax alleged to have been erroneously paid for the month of June, 1925.

"You state that the aforesaid tax of $13.83 was paid on the sale of one Indian Motorcycle to the City of Westfield, a municipal corporation of the State of Massachusetts, which was bought by that city for use in the performance of police duties and was so used.

"You contend that the regulations making taxable sales of motorcycles to municipalities for use in performing their governmental functions are invalid and in contravention to the Federal constitution.

"You are advised that section 600, subdivision (2), of the Revenue Act of 1924, imposes a tax equivalent to 5 per cent of the price for which motorcycles (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith, or with the sale thereof) are sold or leased by the manufacturer, producer or importer.

[fol. 12] "This office holds that the tax applies to the manufacturer's sale of articles enumerated in section 600, subdivision (2) of the Revenue Act of 1924, when sold to the United States Government or to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operations. This holding is in conformity with an opinion rendered by the Attorney General under date of July 7, 1919 (31 Ops. Att'y Gen. 521), relative to taxes imposed by the Revenue Act of 1918 corresponding to the tax imposed by section 600 (2), Revenue Act of 1924.

"Your claim is accordingly rejected."

(9) No part of said sum of $13.83 erroneously collected by the United States has been repaid to the plaintiff. The plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against said government. It is the sole and absolute owner of the claim herein presented. It has made no transfer or assignment of said claim or any part thereof, and is justly entitled to the amount claimed herein from the United States after allowing all just credits and set-offs.

(10) The plaintiff therefore prays judgment in the sum of $13.83 with interest thereon at 6 per cent per annum

[fol. 13] from July 29, 1925, the date of the payment of said tax.

Indian Motocycle Company, by Parmly Hanford, Treasurer. Monte Appel, Attorney for Plaintiff, Munsey Building, Washington, D. C. Frederick Schwertner, C. A. Heisterman, L. Harold Sothoron, of Counsel.

Duly sworn to by Parmly Hanford. Jurat omitted in printing.

[Endorsed:] Court of Claims. No. H-49. Indian Motocycle Company v. The United States. Filed Dec. 3, 1928, Court of Claims.

Endorsed on cover: File No. 33,885. Court of Claims. Term No. 576. Indian Motocycle Company, vs. The United States of America. (Certificate.) Filed Dec. 11th, 1928. File No. 33,885.

In the Court of Claims

INDIAN MOTOCYCLE COMPANY

v.

THE UNITED STATES

Amended question of law

Question of law certified by the Court of Claims to the Supreme Court of the United States, December 4, 1928

At the suggestion of counsel and in conformity with the procedure of the Supreme Court of the United States as set forth in Old Colony Trust Company et al. v. Commissioner, 279 U. S. 716, the question certified with respect to the Indian Motocycle Company v. United States, H–49, is amended to read as follows:

"Where a motor cycle is sold by the manufacturer thereof to a municipal corporation of a State, which has authorized its purchase solely for police purposes, and said motor cycle has at all times been exclusively used for such purposes, is the transaction within the provisions of sec. 600, subdivision (2) of the revenue act of 1924 (43 Stat. 322), and taxable thereunder, notwithstanding the decision of the Supreme Court in the case of Panhandle Oil Co. v. The State of Mississippi, decided May 7, 1928, 277 U. S. 218?"

BY THE COURT.
F. C. KLEINSCHMIDT,
Assistant Clerk.

I, F. C. Kleinschmidt, assistant clerk of the Court of Claims of the United States, do hereby certify that the foregoing amended certificate in the case of Indian Motocycle Company, a corporation, v. the United States of America, No. H–49, was duly filed and entered of record in my office by order of said court, September 16, 1930, and as directed by said court, the said amended certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony whereof, I hereunto subscribe my name and affix the seal of the Court of Claims of the United States, at my office in Washington, D. C., this 16th day of September, A. D., 1930.

[SEAL.] F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims of the United States.

(Indorsed on back:) File No. 33885. Supreme Court U. S. October term, 1930. Term No. 5. Indian Motocycle Co. vs. The United States of America. Amendment to question certified. Filed September 17, 1930.

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FILE COPY

No. 33,885

Office Supreme Court
FILED
MAR 30 192
CHARLES ELMORE C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. ~~456~~ 5

INDIAN MOTOCYCLE COMPANY

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR PLAINTIFF

MONTE APPEL,
Attorney for Plaintiff,
Munsey Building,
Washington, D. C.

Of Counsel:
FREDERICK SCHWERTNER,
National Press Building,
Washington, D. C.

HAYWORTH PRINTING COMPANY, WASHINGTON, D. C.

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McCulloch v. Maryland, 4 Wheat. 316	5
Panhandle Oil Co. v. Mississippi, 277 U. S. 218	2, 4, 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 576

INDIAN MOTOCYCLE COMPANY

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR PLAINTIFF

The Court of Claims did not render any decision in this case, but certified the question of law involved for appropriate instructions.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked by the certificate of the Court of Claims requesting instructions upon the question of law stated in its certificate. This procedure is authorized by Section 3 (a) of the Act of February 13, 1925 (43 Stat. 936).

QUESTION CERTIFIED

The Court of Claims certified to this Court the following question:

"Where a motorcycle is sold by a private corporation

to a municipal corporation of a State and the purchase of said motorcycle was authorized by said municipal corporation for police purposes, for which said motorcycle was at all times exclusively used, is said transaction within the provisions of Section 600, Subdivision (2) of the Revenue Act of 1924 (43 Stat. 322) and the decision of the Supreme Court in the case of the *Panhandle Oil Company* v. *The State of Mississippi*, decided on May 14, 1928, 277 U. S. 218, and taxable thereunder?"

Statute Involved

The statute here involved is Section 600, Subdivision (2) of the Revenue Act of 1924, the pertinent parts of which read as follows:

"Sec. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

"(2) Other automobile chassis and bodies and motorcycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and the body."

Statement of The Case

The pertinent facts of this case are as follows:

On June 16, 1925, Indian Motocycle Company, a Massachusetts corporation, with its office and plant at Springfield, Massachusetts, sold a motorcycle to the City of Westfield, a municipal corporation created by the Commonwealth of Massachusetts. (R. 2.)

The purchase of said motorcycle was authorized by the City of Westfield for police purposes, and the motorcycle was at all times used exclusively for such purposes. (R. 3.)

The price of the motorcycle with the accompanying accessories was $276.50. The tax at 5 per centum, as con-

templated by Section 600, Subdivision (2), of the Revenue Act of 1924 (43 Stat. 322) amounted to $13.83. (R. 2.)

The Motocycle Company submitted to the City of Westfield an invoice in the amount of $290.33, $276.50 representing the sales price of the motorcycle with accompanying accessories, and $13.83 the tax equivalent to 5 per centum of such sales price. (R. 2.)

The City of Westfield, out of its public monies, paid the Motocycle Company the amount of the invoice by delivering its check for $290.33, dated July 6, 1925. (R. 3.)

The Commissioner of Internal Revenue assessed and collected from the Motocycle Company a tax of $13.83 on account of the sale of the said motorcycle. The Motocycle Company filed a claim for refund of said tax which claim the Commissioner of Internal Revenue rejected. The Motocycle Company then instituted in the Court of Claims a suit for recovery of said tax, which suit resulted in the certification to this Court of the question here before it. (R. 3.)

The Contention of Plaintiff

The claim here advanced by the plaintiff is that the Federal and state Governments are each sovereign in their respective spheres; that neither can by taxes lay a burden upon, or in any manner interfere with, the untrammeled exercise of the governmental functions entrusted under the Constitution to the other; that the police power within the corporate limits of the City of Westfield is a power entrusted under the Constitution to the City of Westfield and the Commonwealth of Massachusetts; that the imposition and collection by the Federal Government of the tax here involved burdens and interferes with the exercise by the City of Westfield of such police powers; that Section 600, Subdivision (2), of the Revenue Act of 1924 (43 Stat. 322), if construed to impose such tax in this case, is in contravention of the Constitution and void; that, in accord with the rule that a statute capable of two constructions, one of which leads to constitutionality and the other of which leads to unconstitutionality, is to be construed so as to sustain its validity, this Court should in this case construe the Revenue Act of 1924 so as to put the taxation of the sale here in question beyond its purview.

The Precise Question Before This Court

The question upon which the Court of Claims has requested the instruction of this Court is:

Where a motorcycle is sold by a private corporation to a municipal corporation of a State and purchase of said motorcycle was authorized by said municipal corporation for police purposes, for which said motorcycle was at all times exclusively used, is said transaction within the provisions of Section 600, Subdivision (2) of the Revenue Act of 1924 (43 Stat. 322) and the decision of the Supreme Court in the case of the *Panhandle Oil Company* v. *The State of Mississippi*, decided on May 14, 1928, 277 U. S. 218, and taxable thereunder?

The answer to this question in turn depends upon the answer to be given to the question: Does the imposition and collection of this tax upon the sale of this motorcycle to the City of Westfield burden or interfere with the exercise by the City of Westfield of its police powers?

The answer to this question does not turn upon the amount or degree of such burden or interference. The test in this case is to be sharply distinguished from the test in cases where the claim is made that taxation by the states burdens or interferes with interstate commerce. The criterion of interference by the states with interstate commerce is one of degree and the inquiry in such cases is properly one as to the degree or amount of such interference. But in this case the degree or amount of interference with the exercise by the City of Westfield of its governmental functions is immaterial to the question of the validity of the tax here sought to be imposed. The constitutional prohibition against interference by the Federal Government or the states with the exercise of the governmental functions of the other is absolute. There is an entire absence of power on the part of either the United States or the states to interfere with the exercise of power entrusted under the Constitution to the other. The question in this case, therefore, is not, does the imposition of this tax interfere with the exercise by the City of Westfield of its police powers to such a degree as to destroy such powers? The question is not even, does this tax interfere in an unreason-

able degree with the exercise of such powers? Such inquiries would be pertinent if the claim advanced in this case were that the imposition of a state tax interfered with interstate commerce. But no such claim is here advanced. The claim here advanced is that the Federal Government has no power to burden or interfere with the exercise of the governmental powers entrusted under the Constitution to the City of Westfield, and the sole question here presented is, does the imposition and collection of this tax burden or interfere with the exercise of such powers?

Since *McCulloch* v. *Maryland*, 4 Wheat. 316, such has been the rule of this Court, repeatedly affirmed in subsequent decisions.

In *Johnson* v. *Maryland*, 254 U. S. 51, wherein it was held that a state may not require a post office employe to cease driving a Government motor truck in the transportation of mail over a post road until he shall obtain a license by submitting to examination before a state official and paying a fee, Mr. Justice Holmes said (at pp. 55-56):

> "The cases upon the regulation of interstate commerce cannot be relied upon as furnishing an answer. They deal with the conduct of private persons in matters in which the states as well as the general government have an interest and which would be wholly under the control of the states but for the supervening destination and the ultimate purpose of the Acts. Here the question is whether the states can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today. * * *"

The same rule was again enunciated by Mr. Justice Holmes in *Gillespie* v. *Oklahoma*, 257 U. S. 501, in which

it was held that a state may not impose a tax upon the net income derived by a lessee of restricted Creek and Osage Indian Lands from sales of his share of oil and gas received under his leases, as follows (at pp. 504-5):

> "The argument for the state is based primarily upon the cases sustaining taxes upon net income that include gains from interstate commerce (*Shaffer* v. *Carter*, 252 U. S. 37, 57, 64 L. ed. 445, 458, 40 Sup. Ct. Rep. 221; *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 449, Ann. Cas. 1918 E. 748) when 'all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses' (*William E. Peck & Co.* v. *Lowe*, 247 U. S. 165, 175, 62 L. ed. 1049, 1052, 38 Sup. Ct. Rep. 432).
>
> "* * * The criterion of interference by the states with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the states are to exist and make laws. *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Diamond Glue Co.* v. *United States*, 187 U. S. 611, 616, 47 L. ed. 328, 332, 23 Sup. Ct. Rep. 206. The rule as to instrumentalities of the United States, on the other hand, is absolute in form and at least stricter in substance. *Williams* v. *Talladego*, 226 U. S. 404, 416, 417, 419, 57 L. ed. 275, 280, 281, 33 Sup. Ct. Rep. 116; *Johnson* v. *Maryland*, 254 U. S. 51, 55, 65, L. ed. 126, 128, 41 Sup. Ct. Rep. 16."

In holding the tax valid, Mr. Justice Holmes said at p. 506:

> "* * * The same considerations that invalidate a tax upon the leases invalidates a tax upon the profits of the leases; and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best

terms that it can for its wards. *Weston* v. *Charleston*, 2 Pet. 449, 468, 7 L. ed. 481, 488. * * * "

In *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, decided May 14, 1928, this Court again affirmed the long established rule.

The question in this case, therefore, ultimately resolves itself into the question as to whether the imposition and collection of the tax here involved does in fact burden or interfere with the exercise by the City of Westfield of its police powers.

Argument

That the collection of the tax of $13.83 upon the purchase of the motorcycle did in fact increase the cost of the motorcycle to the City of Westfield is inescapable.

That a tax of this nature would be shifted to and become a burden upon the purchaser was clearly within the contemplation of Congress is disclosed by the Report of the Ways and Means Committee (Report No. 1, 69th Congress, 1st Session) accompanying the Revenue Act of 1926, wherein it is stated (at p. 16):

> "There are two other taxes which, while productive and easy to collect, constitute a burden upon the consumer, to whom they are in most cases shifted by the manufacturer. One of these is the tax on alcohol; the other upon automobile trucks, passenger automobiles, and parts and accessories for the same."

The Committee, of course, intended to include the term, "motorcycles."

The tax on the sale of the motorcycle in this case was in fact shifted to and in fact paid by the City of Westfield, just as in the Panhandle Oil Company case, supra, the tax on the sale of gasoline was shifted to and paid by the United States. The ultimate payment of this tax by the City of Westfield increased the cost of the motorcycle to the City by $13.83. It was clearly a burden upon the city and constituted a direct interference with its exercise of its governmental functions.

The imposition of such a burden upon the city is prohibited by Constitution. The Federal Government lacks the power to impose and collect this tax in this case. The reasonableness or unreasonableness of the amount of the tax is not a factor. Assuming the tax, viewed abstractly, to be reasonable in amount, the United States has no power to collect it upon this transaction.

Unless this Court is willing to remodel our Federal system and to enmesh the gears of the machineries of our Federal and state Governments in a way unknown since the foundation of the Republic, it would seem that the taxation of the transaction here under review should be held to be beyond the purview of the Revenue Act of 1924.

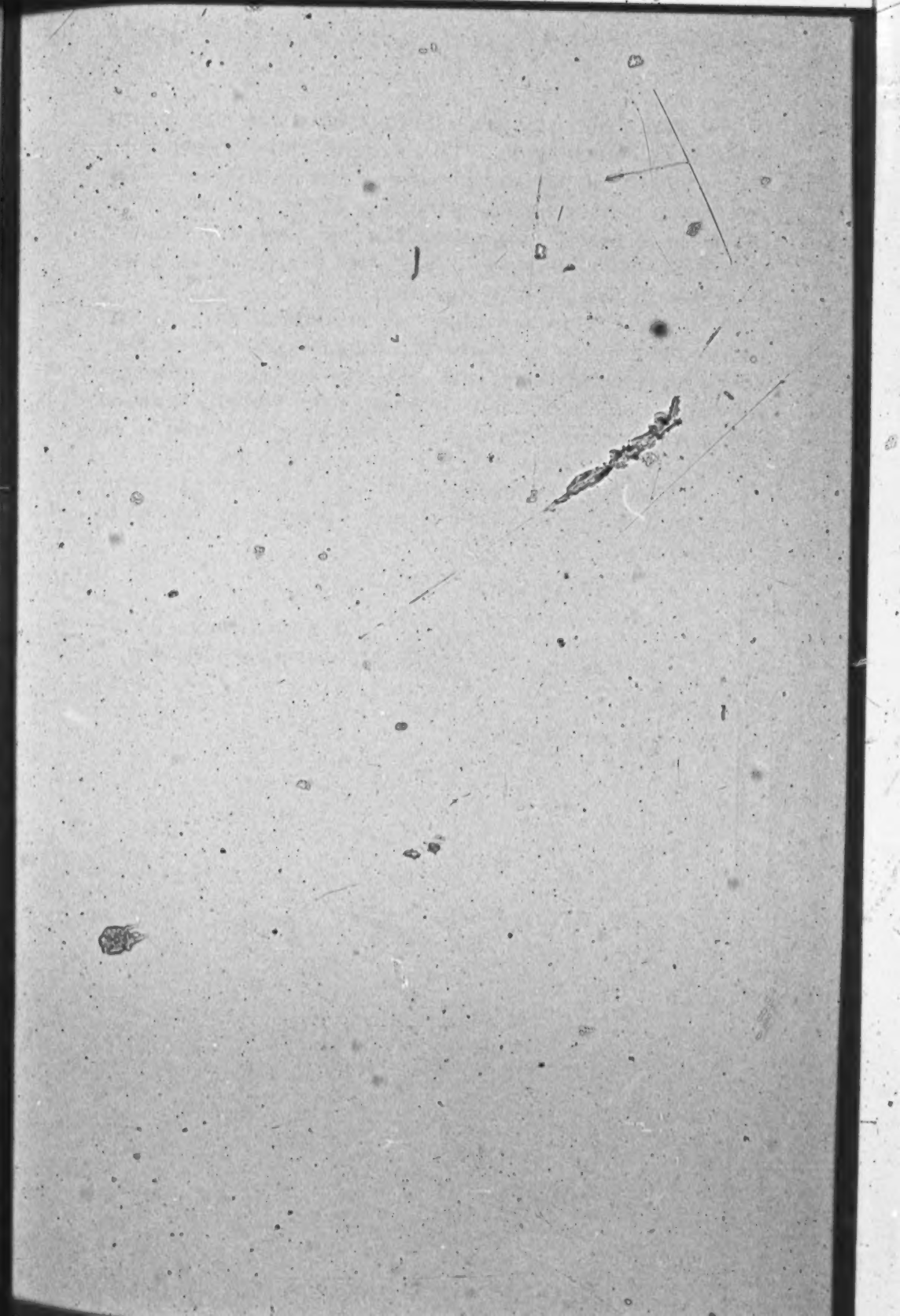
It is respectfully submitted that the question certified by the Court of Claims to this Court should be answered in the negative.

Respectfully submitted,

MONTE APPEL,
Attorney for Plaintiff.

Of Counsel:

FREDERICK SCHWERTNER.



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No. 5

IN THE

Supreme Court of The United States

OCTOBER TERM, 1930

INDIAN MOTOCYCLE COMPANY

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR PLAINTIFF ON REARGUMENT

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OPINION BELOW

The Court of Claims did not render any decision in this case, but certified the question of law involved for appropriate instructions.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked by the certificate of the Court of Claims requesting instructions upon the question of law stated in its certificate. This procedure is authorized by Section 3 (a) of the Act of February 13, 1925 (43 Stat. 936).

QUESTION CERTIFIED

The question certified to this Court as amended reads as follows:

Where a motor cycle is sold by the manufacturer thereof to a municipal corporation of a State, which has authorized its purchase solely for police purposes, and said motor cycle has at all times been exclusively used for such purposes, is the transaction within the provisions of sec. 600, subdivision (2) of the revenue act of 1924 (43 Stat. 322), and taxable thereunder, notwithstanding the decision of the Supreme Court in the case of *Panhandle Oil Co.* v. *The State of Mississippi,* decided May 4, 1928, 277 U. S. 218?

STATUTE INVOLVED

The statute here involved is Section 600, Subdivision (2) of the Revenue Act of 1924, the pertinent parts of which read as follows:

"Sec. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

"(2) Other automobile chassis and bodies and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and the body."

STATEMENT OF THE CASE

The pertinent facts of this case are as follows:

On June 16, 1925, Indian Motocycle Company, a Massachusetts corporation, with its office and plant at Springfield, Massachusetts, sold a motorcycle to the City of Westfield, a municipal corporation created by the Commonwealth of Massachusetts. (R. 2.)

The purchase of said motorcycle was authorized by the City of Westfield for police purposes, and the motorcycle was at all times used exclusively for such purposes. (R. 3.)

The price of the motorcycle with the accompanying accessories was $276.50. The tax at 5 per centum, as contemplated by Section 600, Subdivision (2), of the Revenue Act of 1924 (43 Stat. 322) amounted to $13.83. (R. 2.)

The Motocyle Company submitted to the City of Westfield an invoice in the amount of $290.33, $276.50 representing the sales price of the motorcycle with accompanying accessories, and $13.83 the tax equivalent to 5 per centum of such sales price. (R. 2.)

The City of Westfield, out of its public monies, paid the Motocycle Company the amount of the invoice by delivering its check for $290.33, dated July 6, 1925. (R. 3.)

The Commissioner of Internal Revenue assessed and collected from the Motocycle Company a tax of $13.83 on account of the sale of the said motorcycle. The Motocycle Company filed a claim for refund of said tax which claim the Commissioner of Internal Revenue rejected. The Motocycle Company then instituted in the Court of Claims

a suit for recovery of said tax, which suit resulted in the certification to this Court of the question here before it. (R. 3.)

THE CONTENTION OF PLAINTIFF

The claim here advanced by the plaintiff is that the Federal and state Governments are each sovereign in their respective spheres; that neither can by taxes lay a burden upon, or in any manner interfere with, the untrammeled exercise of the governmental functions entrusted under the Constitution to the other; that the police power within the corporate limits of the City of Westfield is a power entrusted under the Constitution to the City of Westfield and the Commonwealth of Massachusetts; that the imposition and collection by the Federal Government of the tax here involved burdens and interferes with the exercise by the City of Westfield of such police powers; that Section 600, Subdivision (2), of the Revenue Act of 1924 (43 Stat. 322), if construed to impose such tax in this case, is in contravention of the Constitution and void; that, in accord with the rule that a statute capable of two constructions, one of which leads to constitutionality and the other of which leads to unconstitutionality, is to be construed so as to sustain its validity, this Court should in this case construe the Revenue Act of 1924 so as to put the taxation of the sale here in question beyond its purview.

ARGUMENT

I

NEITHER THE UNITED STATES NOR ANY STATE HAS POWER UNDER THE CONSTITUTION TO IMPOSE A TAX WHICH BURDENS OR INTERFERES WITH THE EXERCISE BY THE OTHER OF ITS GOVERNMENTAL FUNCTIONS

It is well established by the decisions of this Court that neither the United States nor any State has power under the Constitution to impose a tax which burdens or interferes with the exercise by the other of its governmental functions. *McCulloch* v. *Maryland,* 4 Wheat. 316. *Weston* v. *City of Charleston,* 2 Pet. 449. *Dobbins* v. *The Commissioners of Erie County,* 16 Pet. 435. *Collector* v. *Day,* 11 Wall. 113. *Western Union Telegraph Company* v. *Texas,* 105 U. S. 460. *Choctaw & Gulf R. R. Co.* v. *Harrison,* 235 U. S. 292. *Indian Oil Co.* v. *Oklahoma,* 240 U. S. 522. *Johnson* v. *Maryland,* 254 U. S. 51. *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218.

II

THE QUESTION AS TO WHETHER THE IMPOSITION AND COLLECTION OF THE TAX HERE INVOLVED BURDENS OR INTERFERES WITH THE EXERCISE BY THE CITY OF WESTFIELD OF ITS POLICE POWERS IS A QUESTION OF FACT AND NOT OF LAW

The inquiry as to whether a particular tax burdens a specific governmental operation calls for the determination of a fact. The ultimate fact of burden or non-burden must be determined in each case in the light of the precise facts presented to the Court by that particular case.

The inquiry as to the ultimate fact of burden or non-burden is primarily an inquiry into the existence or non-existence of a proximate causal re-

lationship between the tax, which is known, and the burden, which is to be determined. This question is also a question of fact.

The proximateness of the causal relationship between tax and burden in any particular case may be shadowy and vague or it may be clear and definite, depending entirely upon the precise facts which give rise to that particular case. There is no mathematically accurate measuring stick which can be applied in any given case for the determination of the proximateness or non-proximateness of the causal relationship between tax and burden. It is as to each case a matter of judgment.

The difference between a causal relationship which is vague and indistinct and one which is clear and definite is in one sense a matter of degree. If we find that a causal connection is vague and indistinct we say it is too remote and indirect to be proximate, and hold that the tax does not result in burden. If we find the causal connection to be clear and direct, we say it is proximate, and hold that the tax does result in burden. In the sense that the determination of the *fact* as to whether the tax is the proximate cause of a burden upon a governmental operation is a matter of judgment, is a matter of the relative definiteness or indefiniteness with which the causal relationship can be perceived, it is a matter of degree.

But once the causal relationship between tax and burden is factually determined, once the *fact* of burden is established, there is no further question of the degree or amount of that burden.

The law as uniformly established by the decis-

ions of this Court is not that the Federal Government and the States may each burden the exercise by the other of its governmental functions, but must not burden them too much in amount or too greatly in degree. The law is not that each may burden the governmental operations of the other by a small tax but not by a large one, or in a reasonable but not in an unreasonable degree. The law is not that each may by tax burden but must not destroy the exercise of the governmental functions of the other, with this Court sitting in each case as the arbiter of the reasonableness of the degree of interference and as the guardian against that degree of interference which would result in destruction.

The law as enunciated in the decisions of this Court since the foundation of the Republic is that the powers not delegated by the States to the Federal Government were reserved to the states; that the Federal Government in its sphere and the states in their sphere are each supreme and sovereign; that there is under the Constitution an entire want and absence of power on the part of each to burden or interfere with the exercise by the other of its sovereign governmental functions.

It is this reciprocal want of power on the part of both the United States and the states which creates and preserves the separate sovereignties of the United States and the states, and gives to the Republic a federalized form of government. The Constitutional prohibition is one of want of power to burden in any degree and this want of power, once the *fact* of burden is established, invalidates the tax which is the proximate cause of the burden.

III

THE IMPOSITION OF THE TAX HERE INVOLVED IN FACT BURDENED THE EXERCISE BY THE CITY OF WESTFIELD OF ITS POLICE POWERS

The tax in this case is a tax upon the sale of a motorcycle to the City of Westfield, measured entirely by the *gross sales price*.

The invoice rendered by the seller to the City of Westfield set out the price of the motor cycle and certain accessories aggregating $276.50 and included as a separate and distinct item "Amount of tax ..... $13.83," such $13.83 being exactly 5% of the purchase price and the exact amount of the tax imposed upon the sale by Section 600 (2) of the Revenue Act of 1924.

The City of Westfield paid the invoice by its check on its public monies for $290.33, representing $276.50, the price of the motor cycle and accessories, and $13.83, the amount of the tax.

The imposition and collection by the United States of this tax on this sale increased the cost of the motor cycle and accessories to the City of Westfield by exactly $13.83. The amount of the tax in its entirety was passed on to and collected from the City of Westfield.

The fact that these excise taxes on sales could be and would be passed on to and collected from the consumers was well known to the Congress. The frank recognition of this fact by Congress is disclosed by the report of the Ways and Means Committee (Report No. 1, 69th Congress, 1st Session) accompanying the Revenue Act of 1926, wherein it is stated (at p. 16):

> "There are two other taxes which, while productive and easy to collect, constitute a burden upon the consumer, to whom they are in most cases shifted by the manufacturer. One of these is the tax on alcohol; the other upon automobile trucks, passenger automobiles, and parts and accessories for the same."

The Committee, of course, intended no distinction as between automobiles and motor cycles.

In fact, the underlying theory of these excise taxes on sales which had their origin as war taxes was that they would be passed on to and collected from the consumer. They were generally designated as luxury taxes and the fact that the imposition of the tax increased the price to the consumer was justified by the answer that a consumer of luxuries in war time could afford to pay and in fairness should pay an increased price for such luxuries. It is a commonly known and generally accepted economic fact of which this Court should take judicial notice that the incidence of excise taxes on sales falls on the purchasers and consumers of the articles sold.

The imposition and collection by the United States of the tax in the amount of of $13.83 was the proximate cause of the increase of $13.83 in the price paid by the City of Westfield for the motor cycle.

There is here no difficulty in tracing the causal connection between tax and burden. The tax is measured by gross sales price, that is, by the gross income received by the seller and the gross outgo of the buyer. The causal connection need not be

traced through to net income. The causal connection between tax and burden is proximate, clear and definite. The imposition of the tax in fact burdened the exercise by the City of Westfield of its police powers.

IV

THE CONSTITUTIONAL PROHIBITION AGAINST INTERFERENCE BY THE FEDERAL GOVERNMENT OR THE STATES WITH THE EXERCISE OF THE GOVERNMENTAL FUNCTIONS OF THE OTHER IS ABSOLUTE, AND IS NOT DEPENDENT UPON THE DEGREE OF SUCH INTERFERENCE

The answer to the question certified by the lower court depends upon the answer to be given to the question: Does the imposition and collection of this tax upon the sale of this motorcycle to the City of Westfield in fact burden or interfere with the exercise by the City of Westfield of its police powers?

The answer to this question does not turn upon the amount or degree of such burden or interference. The test in this case is to be sharply distinguished from the test in cases where the claim is made that taxation by the states burdens or interferes with interstate commerce. The criterion of interference by the states with interstate commerce is one of degree and the inquiry in such cases is properly one as to the degree or amount of such interference. But in this case the degree or amount of interference with the exercise by the City of Westfield of its governmental functions is immaterial to the question of the validity of the tax here sought to be imposed. The constitutional prohibition against interference by the Federal Government or the states with the exercise of the governmental functions of the other is absolute. There

is an entire absence of power on the part of either the United States or the states to interfere with the exercise of power entrusted under the Constitution to the other. The question in this case, therefore, is not, does the imposition of this tax interfere with the exercise by the City of Westfield of its police powers to such a degree as to destroy such powers? The question is not even, does this tax interfere in an unreasonable degree with the exercise of such powers? Such inquiries would be pertinent if the claim advanced in this case were that the imposition of a state tax interfered with interstate commerce. But no such claim is here advanced. The claim here advanced is that the Federal Government has no power to burden or interfere with the exercise of the governmental powers entrusted under the Constitution to the City of Westfield, and the sole question here presented is, does the imposition and collection of this tax burden or infere with the exercise of such powers?

Since *McCulloch* v. *Maryland,* 4 Wheat. 316, such has been the rule of this Court, repeatedly affirmed in subsequent decisions.

In *Johnson* v. *Maryland,* 254 U. S. 51, wherein it was held that a state may not require a post office employe to cease driving a Government motor truck in the transportation of mail over a post road until he shall obtain a license by submitting to examination before a state official and paying a fee, Mr. Justice Holmes said (at pp. 55-56):

> "The cases upon the regulation of interstate commerce cannot be relied upon as furnishing an answer. They deal with the conduct of private persons in matters in which

> the states as well as the general government have an interest and which would be wholly under the control of the states but for the supervening destination and the ultimate purpose of the Acts. Here the question is whether the states can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today. * * *"

The same rule was again enunciated by Mr. Justice Holmes in *Gillespie* v. *Oklahoma*, 257 U. S. 501, in which it was held that a state may not impose a tax upon the net income derived by a lessee of restricted Creek and Osage Indian Lands from sales of his share of oil and gas received under his leases, as follows (at pp. 504-5):

> "The argument for the state is based primarily upon the cases sustaining taxes upon net income that include gains from interstate commerce (*Shaffer* v. *Carter*, 252 U. S. 37, 57, 64 L. ed. 445, 458, 40 Sup. Ct. Rep. 221; *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 449, Ann. Cas. 1918 E. 748) when 'all expenses

are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses' (*William E. Peck & Co.* v. *Lowe*, 247 U. S. 165, 175, 62 L. ed. 1049, 1052, 38 Sup. Ct. Rep. 432).

" * * * The criterion of interference by the states with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the states are to exist and make laws. *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Diamond Blue Co.* v. *United States*, 187 U. S. 611, 616, 47 L. ed. 328, 332, 23 Sup. Ct. Rep. 206. The rule as to instrumentalities of the United States, on the other hand, is absolute in form and at least stricter in substance. *Williams* v. *Talladego*, 226 U. S. 404, 416, 417, 419, 57 L. ed. 275, 280, 281, 33 Sup. Ct. Rep. 116; *Johnson* v. *Maryland*, 254 U. S. 51, 55, 65, L. ed. 126, 128, 41 Sup. Ct. Rep. 16."

In *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, decided May 14, 1928, this Court again affirmed the long established rule.

The question in this case, therefore, ultimately resolves itself into the question as to whether the imposition and collection of the tax here involved does in fact burden or interfere with the exercise by the City of Westfield of its police powers.

V

IF THE COLLECTION OF THE TAX IMPOSED BY THE UNITED STATES IN FACT BURDENED THE EXERCISE BY THE CITY OF WESTFIELD OF ITS GOVERNMENTAL OPERATIONS, IT IS OF NO CONSEQUENCE THAT THE TAX WAS NOT COLLECTED DIRECTLY FROM THE CITY OF WESTFIELD OR FROM ONE OF ITS INSTRUMENTALITIES OR AGENTS

The tax here involved was an excise tax upon the sale of a motor cycle. The Indian Motocycle Company, the plaintiff, was the seller and the City of Westfield was the buyer.

The tax was imposed upon the sale. The duty of reporting the sale and paying the tax was laid upon the seller. The selection of the seller instead of the buyer as the one to be charged with the legal duty of reporting and paying was prompted solely by considerations of administrative efficiency, as will be shown in a subsequent part of this brief. It was entirely a question of the selection of a machinery for the administration and collection of the tax.

Once the *fact* of burden is established, it is immaterial what kind of machinery or collection device was used to impose the burden. This may be most concretely demonstrated by a discussion of two cases heretofore cited.

In *Western Union Telegraph Company* v. *State of Texas,* 105, U. S. 460, this Court held invalid an excise tax of one cent imposed by the State of Texas upon each message transferred by the Telegraph Company when the United States was the sender. The duty of reporting the transaction and paying the tax was upon the Telegraph Company.

In *Weston* v. *City of Charleston,* 2 Pet. 449, this Court held invalid a tax upon stock imposed by the

City of Charleston upon stock of the United States. The tax was payable by the owners of the stock.

Obviously, neither the telegraph company in the Western Union case, nor the individual owner of the stock of the United States in the Weston case was the instrumentality of the United States. Nor was either an agent of the United States. The respective taxes before the Court in these two cases were held invalid, not because the persons from whom such taxes were collectible were instrumentalities or agents of the United States, but because the imposition and collection of these taxes from these persons created a burden in fact upon essential governmental operations of the United States. The fact of burden being once established, it was no answer to the charge of invalidity that the taxes were not collectible from the United States. The particular administrative machinery set up for the levy, assessment and collection of these taxes was of no consequence. Having found as a fact that the taxes burdened the governmental operations of the United States, this Court held such taxes invalid, without reference to the person from whom such taxes were collected.

VI

THE DECISION OF THIS COURT IN THE PANHANDLE OIL COMPANY CASE CONTROLS THIS CASE

The Panhandle Oil Company case and this case are identical on their facts. In both cases the tax imposed was an excise tax. In both cases the act taxed was sale. In both cases the tax was measured by the gross sales price. In both cases the legal duty of reporting the transaction and paying the

tax was upon the seller. In both cases the seller was a private corporation.

No distinction is drawn in the cases and none is suggested by the Solicitor General as between the power of a State to tax the governmental operations of the United States and the power of the United States to tax the governmental operations of a State. The want of power is mutual and identical. If it be sound, as was held by this Court in the Panhandle case, that a tax measured by gross sales price upon a sale to the United States is invalid, it follows that a tax measured by gross sales price upon a sale to a state is invalid.

VII

THE PANHANDLE OIL COMPANY CASE AND THIS CASE CANNOT BE DISTINGUISHED ON THE GROUND OF A DIFFERENCE BETWEEN THE THINGS TAXED

The plaintiff in its brief filed upon the original submission of this case, contended that this case was controlled by the decision of this Court in the case of *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218.

The Government in its brief, filed upon the original submission of this case, admitted the correctness of plaintiff's contention and stated, "* * * we believe that the present case is not distinguishable from the Panhandle Oil Co. case and that the plaintiff in the present case is therefore entitled to recovery."

Since this Court set this case down for reargument, the Government has filed a second brief, and in this second brief, has completely reversed its position as stated in its original brief.

In its second brief, the Government refrains from attacking the correctness of the decision of

this Court in the Panhandle case. On the contrary, the Government in its second brief, impliedly admits the correctness of this Court's decision in the Panhandle case, but undertakes to distinguish the Panhandle case from this case.

The Government does not contend that the two cases are distinguishable on their facts. On the contrary, the Government, by implication at least, admits that the facts in the two cases are substantially identical. The Government does not undertake to make any distinction between the two cases on the ground that there is a difference in the nature of the tax sought to be imposed. On the contrary, the Government, by implication at least, admits that the taxes sought to be imposed in both cases are excise taxes. The sole distinction sought to be made by the Government is that there is a difference in the thing taxed. In the Panhandle case the thing taxed was the sale. In this case the thing taxed, so the Government contends, is the manufacture, production or importation *and* sale.

The answer of the plaintiff to the Government's contention that the Panhandle case and this case are distinguishable on the ground that there is a difference in the thing taxed is, first, that no such difference in fact exists and, second, that such difference, if it did exist, would lead to no difference in legal result.

If there is a difference between the things taxed under the two statutes, such difference can be found only in the statutes themselves. That no such difference in fact exists is made clear by a comparison of the words of such statutes.

In the Panhandle case, the statute involved was

Chapter 116 of the Laws of Mississippi of 1922, which provided that "* * * any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1c (one cent) per gallon upon the sale of gasoline * * *."

In this case, the statute involved is Section 600 (2) of the Revenue Act of 1924, which provided that "* * * there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased ————."

Under both statutes the thing taxed was the sale, that is, the transfer of title from vendor to vendee. The only difference in the statutes is in the machinery for assessment and collection of the tax and this difference is wholly one of administration.

A motor cycle to come into being and be within the confines of the United States and so subject to tax by the United States must of necessity be either manufactured or produced in the United States or imported into the United States. Hence by providing that the tax should be collectible from either the manufacturer, producer or importer, as the case might be, the Federal statute was made administratively effective. The tax was upon the sale. But the sale as an abstract thing could not be charged with the legal duty of reporting the transaction and paying the tax. This duty of necessity had to be laid upon some person.

Since the tax was upon the sale, the legal duty of reporting the transaction, as a matter of practical

necessity, had to be imposed upon either the seller or the buyer.

To impose this duty on the buyer was not practical or advisable from an administrative viewpoint. The Government would be dealing with too many people, many of them with no fixed place of business, many of them financially irresponsible. Too many buyers would fail to make the reports and pay the tax. The cost to the Government of handling the millions of reports, literally millions, which would be made each month by the purchasers of the automobiles, the kodaks, the motor cycles and the other things subjected to sales tax, would be too great. It was not administratively feasible to impose upon the buyers the duty of reporting the transaction and paying the tax.

With the sellers the situation was quite different. Relatively few in number, having fixed places of business, generally financially responsible, the Government could impose on them the duty of reporting the transaction and paying the tax with the realization that there would be little or no tax evasion and that the expense of administering this tax would be reduced to a minimum. Administratively viewed, the imposition on the sellers of the legal duty of reporting and paying was feasible, effective and cheap.

It was these considerations of administrative policy which prompted the Government to impose the legal duty of reporting the transaction and paying the tax upon the sellers, rather than upon the buyers. Since manufacturers, producers and importers of motor cycles manufacture, produce or import, as the case may be, for sale and not for use,

and since every motor cycle, to come into being and be within the United States so as to be subject to tax, must be either manufactured or produced or imported, the enumeration in the Revenue Act of "manufacturer, producer and importer" included every possible initial seller and made definite and certain the particular seller who was under the legal duty of reporting and paying the tax.

This particularity was essential to clarity in the statute. The tax was upon the sale. The intent was to collect one tax upon one sale. A motor cycle may be sold a number of times. Only one sale is to be taxed. To which sale is the tax to attach? Which one of several possible sellers of the same motor cycle shall be charged with the duty of reporting the transaction and paying the tax? Administratively viewed, the easiest seller to deal with is the first seller. The first sale is the easiest sale to locate and tax. And it was against the first sale that this tax was directed. But how can the first sale be most accurately defined in the statute? Shall the statute say "the first sale" and permit each seller to determine for himself whether he is the first seller of a particular motor cycle or shall the statute set out an enumeration of classes of persons, into one of which classes each initial seller must of necessity fall? The statute wisely adopted the latter alternative. By enumerating "manufacturer, producer, or importer," it fixed the first seller with definiteness and made sure that the first sale and no subsequent sale would be taxed.

But the enumeration of "manufacturer, producer or importer" as the three classes into one of which a first seller of a motor cycle must of necessity fall, did not impose on the manufacturer, pro-

ducer or importer a tax as such. No tax was imposed on him because he was a manufacturer, producer or importer, or because he manufactured, produced or imported motor cycles. He could manufacture, produce or import motor cycles by the thousand without one penny of tax attaching. If it happened that, after manufacture, production or importation, the motor cycles were burned up, no tax would ever attach. It was solely the fact of sale which caused the tax to attach and it was solely the fact that the manufacturer, producer or importer was the seller which caused him to be under the legal duty of reporting the transaction and paying the tax. It was solely as the seller that he came into the tax picture and the fact of his description in the tax statute as manufacturer, producer or importer was prompted solely by consideration of administrative policy and not by any intent to tax him or his act of manufacturing, producing or importing.

The same considerations of administrative policy prompted the State of Mississippi in the statute involved in the Panhandle case to impose upon the distributor or dealer the duty of reporting and paying the tax upon sales of gasoline.

Most, if not practically all, of the gasoline consumed in the State of Mississippi was manufactured or produced outside the State. An attempt to charge the manufacturer or producer with the duty of reporting the transaction and paying the tax would have been in most instances a nullity, both jurisdictionally and administratively. Some person, other than the manufacturer or producer, upon whom this duty could be imposed, had to be

found. As a matter of practical necessity, it had to be either the seller or the buyer. The practical considerations which prompted the Federal Government not to try to deal with the buyers operated with equal force upon the State of Mississippi. The same practical considerations prompted both governments to impose upon the seller the duty of reporting and paying. In both cases one tax upon one sale was to be imposed. Upon sales of gasoline within a State, the particular seller upon whom the duty could be most effectively imposed was the first seller. As a practical proposition the first seller was either the distributor who was the wholesaler or the dealer who was the retailer. If the first sale of the gasoline made within the State was made by a wholesaler, then the tax attached to this sale and the wholesaler had to report and pay the tax. If a retailer bought his gasoline directly from a manufacturer outside the State and thus eliminated the wholesaler, then the first sale of this gasoline within the State would be made by the retailer, and the tax attached to this sale, and the dealer had to report and pay the tax. In both cases, whether the gasoline was purchased by the wholesaler and sold to the retailer, or purchased directly by the retail dealer from the manufacturer, the first sale within the State was the sale taxed and the only sale taxed. In both cases, the first seller was the one who was charged with the duty of reporting and paying. It was the fact that the distributor or retailer, as the case might be, was the first seller, and not the fact that he was a distributor or retailer or that he distributed or retailed, which caused the tax to attach.

Under both the Mississippi statute and the Fed-

eral statute the sale was the thing taxed. Under both statutes the fact of sale alone caused the tax to attach and under neither statute was any other or further act essential to the attachment of the tax. The only difference between the statutes is in the administrative machinery adopted for the assessment and collection of the taxes imposed.

It is submitted, therefore, that the distinction which the Government has attempted to draw between this case and the Panhandle case has no basis in fact and that on the basis of both the intent of the two statutes and their actual operation, the two cases are identical.

VIII

ASSUMING THAT THE DIFFERENCE BETWEEN THE PANHANDLE CASE AND THIS CASE FOR WHICH THE GOVERNMENT CONTENDS, IN FACT EXISTS, SUCH DIFFERENCE WOULD LEAD TO NO DIFFERENCE IN LEGAL RESULT BETWEEN THE CASES

This Court, in *Cornell* v. *Coyne,* 192 U. S. 417, held valid a tax imposed by the United States upon the manufacture of filled cheese and in *Wheeler Lumber Company* v. *United States,* 281 U. S. 572, a tax imposed by the United States upon transportation. In an effort, apparently, to escape control of the Panhandle case and at the same time to bring this case within the control of the filled cheese and Wheeler Lumber Company cases, the Government advances its argument that the thing taxed in the Panhandle case was the sale, whereas the thing taxed in this case was the manufacture, production, or importation *and* sale. Assuming the existence of this difference for which the Government contends, it would lead to no difference in legal result between the Panhandle case and this case.

The filled cheese case held valid a tax upon manufacture. The Panhandle case held invalid a tax upon sale. In this case, says the Government, we have a tax upon manufacture *and* sale, that is, a combination of the tax which was held valid and the tax which was held invalid. A valid tax added to an invalid tax, argues the Government, makes the invalid tax valid.

The argument is patently fallacious. If the Federal Government is without power under the Constitution to retard, impede or burden by tax the exercise by the state of its governmental functions, then, obviously, the Federal Government cannot create that power by purporting to exercise it in conjunction with another power which it admittedly has. If the Federal Government is without power under the Constitution to interfere with the exercise by the states of their governmental functions, then there is obviously nothing which the legislative or executive branches of the Federal Government can do to amend in effect the prohibition of the Constitution and create for themselves a power which is denied to them by the Constitution. If the Federal Government is without power under the Constitution to levy and collect a tax upon a sale to a state, under the facts of this case, then that want of power is not supplied and inherently cannot be supplied by a purported enlargement of the power which does not exist. An invalid tax is not made valid by adding to it a valid tax. The invalidity of the bad tax, the want of power which made the tax bad, still remains.

If a tax on sale is invalid under the Constitution, then a tax on both manufacture and sale must of necessity be invalid.

CONCLUSION

In conclusion, it is submitted that the imposition by the United States of the tax here involved did in fact burden the exercise by the City of Westfield of its police powers; that the imposition of such burden is prohibited by the Constitution, and that the Court, following its decision in the Panhandle case, should answer the question certified in the negative.

Respectfully submitted,

MONTE APPEL,
Attorney for Plaintiff.

Of Counsel,
FREDERICK SCHWERTNER.

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No. 5

IN THE

Supreme Court of The United States

OCTOBER TERM, 1930

INDIAN MOTOCYCLE COMPANY

v.

THE UNITED STATES OF AMERICA

PLAINTIFF'S MEMORANDUM BRIEF

IN THE

Supreme Court of The United States

OCTOBER TERM, 1930

No. 5

INDIAN MOTOCYCLE COMPANY

v.

THE UNITED STATES OF AMERICA

PLAINTIFF'S MEMORANDUM BRIEF

The fact that Congress not only contemplated that the tax imposed upon sales would be passed on to the consumer, but actually intended such tax to be passed on to the consumer, is shown by Section 1312 of the Revenue Act of 1918, which reads as follows:

> "That (a) if any person has prior to May 9, 1917, made a bona fide contract with a dealer for the sale or lease, after the tax takes effect, of any article in respect to which a tax is imposed under Title VI, VII, or IX, or under subdivision 13 of Schedule A of Title XI, or under this subdivision, and (b) if such contract does not permit the adding of the whole of such tax to the amount to be paid under such contract, then the vendee or lessee shall, in lieu of the vendor or lessor, pay so much of such tax as is not so permitted to be added to the

contract price. If a contract of the character above described was made with any person other than a dealer, the tax collected under this Act shall be the tax in force on May 9, 1917."

Respectfully submitted,

MONTE APPEL,
Attorney for Plaintiff.

Of Counsel,
FREDERICK SCHWERTNER.

(Filed Supreme Court, U. S.)
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No. [redacted] 5

In the Supreme Court of the United States

October Term, 1928

INDIAN MOTOCYCLE COMPANY

v.

THE UNITED STATES OF AMERICA

ON CERTIORARI FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

(Supreme Printing Company, Inc.)

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 576

INDIAN MOTOCYCLE COMPANY

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Court of Claims rendered no opinion.

JURISDICTION

The case is here on a question of law certified to this Court by the Court of Claims, pursuant to Section 3(a) of the Act of February 13, 1925.

THE QUESTION PRESENTED

The question certified is as follows (R. 5):

> Question: Where a motor cycle is sold by a private corporation to a municipal corporation of a State and the purchase of said

motor cycle was authorized by said municipal corporation for police purposes, for which said motor cycle was at all times exclusively used, is said transaction within the provisions of Section 600, subdivision (2) of the Revenue Act of 1924 (43 Stat. 322) and the decision of the Supreme Court in the case of *Panhandle Oil Co.* v. *The State of Mississippi,* decided on May 14, 1928, 277 U. S. 218, and taxable thereunder?

While the question as certified does not state, and the record does not show, that the vendor was a manufacturer, producer, or importer, it must have been, because otherwise the transaction clearly would not be taxable under Section 600 of the Revenue Act of 1924. Moreover, the question as certified seems somewhat unfortunately expressed in asking whether the transaction is within the provisions of Section 600 *and* the decision in the *Panhandle Oil Co. case* "and taxable thereunder." The question which the Court of Claims intended to present was undoubtedly whether the transaction is within the provisions of Section 600 and taxable thereunder *notwithstanding* the decision in the *Panhandle Oil Co. case.*

THE STATUTE INVOLVED

The relevant section of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 322) is as follows:

SEC. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and

paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

* * * * *

(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and of the body.

A similar tax was imposed by Section 600 of the Revenue Act of 1917 (c. 63, 40 Stat. 300, 316), Section 900 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1122), Section 900 of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 291), and Section 600 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 93).

REGULATIONS AND RULINGS

The first published regulation of the Treasury Department in relation to the taxation of articles sold to States or political subdivisions thereof, appeared on May 31, 1918, in Regulations 44, Article VII, as follows:

* * * Articles sold to a State or a political subdivision thereof for use in carrying on its governmental operations are not subject to the tax.

Following the passage of the Revenue Act of 1918, Regulations 47 (T. D. 2832) were published in May, 1919, and contained the following:

> ART. 10. *Sales to the Government or a State.*—* * * Articles sold to a State or a political subdivision thereof by the manufacturer for use in carrying on its governmental operations are not subject to the tax. Articles sold by a manufacturer to a State, county, or municipal institution are also exempt from tax when paid for entirely out of public money.

Following the publication of this regulation the Secretary of the Treasury requested an opinion from the Attorney General of the United States on the question whether or not the excise tax imposed by Section 900 of the Revenue Act of 1918 applied to sales of the enumerated articles to a State or political subdivision thereof. The Attorney General rendered an opinion which is reported in 31 Opinions of Attorneys General 520. This reads as follows:

> DEPARTMENT OF JUSTICE,
> *July 7, 1919.*
>
> SIR: I have the honor to acknowledge receipt of your letter of May 14, requesting my opinion upon the question whether the excise tax imposed by section 900 of the Revenue Act of February 24, 1919 (40 Stat. 1122), upon the manufacturer, producer, or importer upon the price for which articles enumerated in the section are sold, applies upon sales of

such taxable articles to a State or a political subdivision thereof.

Section 900 provides (40 Stat. 1122):

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—"

Then follow a number of subdivisions specifying various articles and the rate per centum of the tax levied thereon. Subdivision 10 of the section is as follows:

"Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, the District of Columbia, or any foreign country while engaged against the German Government in the present war, 10 per centum;"

Section 903 (40 Stat. 1123) provides:

"That every person liable for any tax imposed by section 900, 902, or 906, shall make monthly returns under oath in duplicate and pay the taxes imposed by such sections to the collector for the district in which is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe."

It is my opinion that this tax applies to sales to a State or a political subdivision

thereof, except those articles embraced by subdivision 10.

The exception contained in subdivision 10 indicates the congressional intent that the tax shall apply to the articles specified in the other subdivisions.

The United States, of course, can not tax the property or the instrumentalities of a State, but here the tax is not laid upon either the property or the instrumentalities of the State. If it reaches the State at all it does so only in an indirect manner. The tax is laid upon the manufacturer, and while it is probable that he will pass it on to the consumer, the tax itself is not laid upon the consumer. The burden, therefore, if it falls upon the State, does so indirectly. Such an incidental and indirect effect results from the payment of all taxes, and while this tax may be traced more directly into the cost to the State, yet the fact remains that it is an incidental and indirect burden upon the State and not the taxation of either its property or its instrumentalities. *Snyder* v. *Bettman*, 190 U. S. 249; *Baltic Mining Company* v. *Massachusetts*, 231 U. S. 68; *Kansas City, Fort Scott & Memphis Railway Company* v. *Kansas*, 240 U. S. 227; *The American Manufacturing Company* v. *The City of St. Louis*, decided by the Supreme Court on June 9.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

As a result of this opinion of the Attorney General, on July 22, 1919, Treasury Decision 2897 was

issued by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. This decision amended Article 10 of Regulations 47 under the Revenue Act of 1918 to read as follows:

> ART. 10. *Sales to the Government or a State.*—* * * The tax also applies to the articles enumerated in this section, except to those enumerated under subdivision (10), when sold to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operations.

This provision was also contained in the revision of Regulations 47 under the 1918 Act in December, 1920 (T. D. 3132), and similar provisions were contained in revisions of January, 1922 (T. D. 3278), August, 1924 (T. D. 3630), and May, 1926 (T. D. 3862), under the 1921, 1924, and 1926 Acts. The provision under the 1924 Act, which is the one directly involved in the present case, is as follows:

> ART. 10. *Sales to the Government or a State.*—The tax applies to articles enumerated in section 600, except those enumerated under subdivision 6 (see Art. 19), when sold to the United States Government. The same is true of articles sold to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operations. * * *

STATEMENT

The case was heard by the Court of Claims on an agreed statement of facts. (R. 2.) The Indian Motocycle Company, a Massachusetts corporation, on or about June 16, 1925, sold a motorcycle to the City of Westfield, Massachusetts. The total amount paid by the City of Westfield was $290.33, of which $13.83 appeared on the invoice as "amount of tax." (R. 2.) This $13.83 was five per cent of the price of the motorcycle.

The motorcycle was purchased by the City of Westfield for police purposes, and was used at all times exclusively for those purposes. (R. 3.)

The Commissioner of Internal Revenue assessed a tax of $13.83 against the plaintiff company under the provisions of Subdivision 2 of Section 600 of the Revenue Act of 1924, which tax the plaintiff paid. (R. 3.) Subsequently the plaintiff filed a claim for refund, setting out as a ground therefor that (R. 3):

> * * * the regulations making taxable sales of motorcycles to municipalities for use in performing their governmental functions are invalid and in contravention of the Federal Constitution.

The claim was disallowed by the Commissioner of Internal Revenue (R. 3, 4), and the plaintiff brought this suit to recover $13.83 with interest. (R. 6–10.)

ARGUMENT

While the amount sued for in the present case is only $13.83, the question here involved is important, and a decision that the sale of the motor cycle to the City of Westfield was not taxable may require the refund of large sums of money collected as taxes. Since 1919 the Regulations of the Treasury Department have provided that articles sold to a State or political subdivision thereof are subject to tax. The Court of Claims has certified that there is a division of the court and that the court is in doubt. Under these circumstances we have felt justified in not asking the Court of Claims to withdraw its certificate, although we believe that the present case is not distinguishable from the *Panhandle Oil Co. case* and that the plaintiff in the present case is therefore entitled to recover. It is true that the tax imposed by Section 600 of the Revenue Act of 1924 is a tax upon the vendor (*Lash's Products Co.* v. *United States*, 278 U. S. 175), but so also were the taxes involved in the *Panhandle Oil Co. case.*

In the *Panhandle Oil Co. case* the taxes held to be invalid were State taxes imposed upon dealers in gasoline and measured by sales to the United States, while in the present case the tax is a Federal tax imposed upon a vendor and measured by a sale to a political subdivision of a State, but there can be no doubt that the right of the States and their political subdivisions to have their transactions untrammeled by Federal taxation is as broad as the

right of the Federal Government to have its transactions untrammeled by State taxation. The tax involved in the *Panhandle Oil Co. case* was imposed upon "any person engaged in the business of distributing gasoline, or retail dealer in gasoline," while in the present case the tax is imposed upon "articles sold or leased by the manufacturer, producer, or importer." But whether the tax is measured by the final sale to the ultimate consumer or the initial sale by the manufacturer, producer, or importer seems to furnish no ground for distinction so long as the sale by which the tax is to be measured is to the United States or a State or political subdivision thereof, as the case may be.

CONCLUSION

We believe that the present case is governed by the decision of this Court in the *Panhandle Oil Co. case* and that the answer to the question certified by the Court of Claims is that the transaction here involved is not taxable under Section 600 of the Revenue Act of 1924.

WILLIAM D. MITCHELL,
Attorney General.

ALFRED A. WHEAT,
GARDNER P. LLOYD,
Special Assistants to the Attorney General.

APRIL, 1929.

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OCT 17 1930
CHARLES ELMORE CROP
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No. 5

In the Supreme Court of the United States

OCTOBER TERM, 1930

INDIAN MOTOCYCLE COMPANY

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES ON REARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 5

INDIAN MOTOCYCLE COMPANY

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THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES ON REARGUMENT

OPINION BELOW

The Court of Claims rendered no opinion.

JURISDICTION

The case is here on a question of law certified to this Court by the Court of Claims, pursuant to Section 3 (a) of the Act of February 13, 1925.

THE QUESTION PRESENTED

The amended certified question is (R. 11):

> Where a motor cycle is sold by the manufacturer thereof to a municipal corporation of a State, which has authorized its purchase

solely for police purposes, and said motor cycle has at all times been exclusively used for such purposes, is the transaction within the provisions of sec. 600, subdivision (2) of the revenue act of 1924 (43 Stat. 322), and taxable thereunder, notwithstanding the decision of the Supreme Court in the case of *Panhandle Oil Co.* v. *The State of Mississippi,* decided May 4, 1928, 277 U. S. 218?

STATUTES INVOLVED

The relevant section of the Revenue Act of 1924, c. 234, 43 Stat. 253, 322 (U. S. C. Title 26, Sec. 881), is as follows:

> SEC. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—
>
> * * * * *
>
> (2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and of the body.

A similar tax was imposed by Section 600 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 316, Sec-

tion 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1122, Section 900 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 291, and Section 600 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 93 (U. S. C. App. Title 26, Sec. 881).

REGULATIONS AND RULINGS

The first published regulation of the Treasury Department in relation to the taxation, under Section 600 of the Revenue Act of 1917, of articles sold to States or political subdivisions thereof, appeared on May 31, 1918, in Regulations 44, Article VII, as follows:

> * * * Articles sold to a State or a political subdivision thereof for use in carrying on its governmental operations are not subject to the tax.

Regulations 47 (T. D. 2832), published in May, 1919, following the passage of the Revenue Act of 1918, contained the following provision:

> ART. 10. *Sales to the Government or a State.*—* * * Articles sold to a State or a political subdivision thereof by the manufacturer for use in carrying on its governmental operations are not subject to the tax. Articles sold by the manufacturer to a State, county, or municipal institution are also exempt from tax when paid for entirely out of public money.

Following the publication of this regulation, the Secretary of the Treasury requested an opinion from the Attorney General of the United States on the question whether or not the excise tax imposed

by Section 900 of the Revenue Act of 1918 applied to sales of the enumerated articles to a State or political subdivision thereof. The Attorney General rendered an opinion, 31 Opinions of Attorneys General 520, as follows:

DEPARTMENT OF JUSTICE,
July 7, 1919.

SIR: I have the honor to acknowledge receipt of your letter of May 14, requesting my opinion upon the question whether the excise tax imposed by section 900 of the Revenue Act of February 24, 1919 (40 Stat. 1122), upon the manufacturer, producer, or importer upon the price for which articles enumerated in the section are sold, applies upon sales of such taxable articles to a State or a political subdivision thereof.

Section 900 provides (40 Stat. 1122):

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—"

Then follow a number of subdivisions specifying various articles and the rate per centum of the tax levied thereon. Subdivision 10 of the section is as follows:

"Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, the District of Columbia, or any foreign country while engaged against the

German Government in the present war, 10 per centum;"

Section 903 (40 Stat. 1123) provides:

"That every person liable for any tax imposed by section 900, 902, or 906, shall make monthly returns under oath in duplicate and pay the taxes imposed by such sections to the collector for the district in which is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe."

It is my opinion that this tax applies to sales to a State or a political subdivision thereof, except those articles embraced by subdivision 10.

The exception contained in subdivision 10 indicates the congressional intent that the tax shall apply to the articles specified in the other subdivisions.

The United States, of course, can not tax the property or the instrumentalities of a State, but here the tax is not laid upon either the property or the instrumentalities of the State. If it reaches the State at all it does so only in an indirect manner. The tax is laid upon the manufacturer, and while it is probable that he will pass it on to the consumer, the tax itself is not laid upon the consumer. The burden, therefore, if it falls upon the State, does so indirectly. Such an incidental and indirect effect results from the payment of all taxes, and while this tax

may be traced more directly into the cost to the State, yet the fact remains that it is an incidental and indirect burden upon the State and not the taxation of either its property or its instrumentalities. *Snyder* v. *Bettman*, 190 U. S. 249; *Baltic Mining Company* v. *Massachusetts*, 231 U. S. 68; *Kansas City, Fort Scott & Memphis Railway Company* v. *Kansas*, 240 U. S. 227; *The American Manufacturing Company* v. *The City of St. Louis*, decided by the Supreme Court on June 9.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

As a result of this opinion of the Attorney General, on July 22, 1919, Treasury Decision 2897 was issued by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. This decision amended Article 10 of Regulations 47 under the Revenue Act of 1918 to read as follows:

ART. 10. *Sales to the Government or a State.*—* * * The tax also applies to the articles enumerated in this section, except to those enumerated under subdivision (10), when sold to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operations.

This provision was also contained in the revision of Regulations 47 under the 1918 Act in December,

1920 (T. D. 3132), and similar provisions were contained in revisions of January, 1922 (T. D. 3278), August, 1924 (T. D. 3630), and May, 1926 (T. D. 3862), under the 1921, 1924, and 1926 Acts. The provision under the 1924 Act, which is the one directly involved in the present case, is as follows:

> ART. 10. *Sales to the Government or a State.*—The tax applies to articles enumerated in Section 600, except those enumerated under subdivision 6 (see Art. 19), when sold to the United States Government. The same is true of articles sold to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operation. * * *

STATEMENT OF THE CASE

The case was heard by the Court of Claims on an agreed statement of facts. (R. 2.) The Indian Motocycle Company, a Massachusetts corporation, on or about June 16, 1925, sold a motor cycle to the City of Westfield, Massachusetts. The total amount paid by the City of Westfield was $290.33, of which $13.83 appeared on the invoice as "amount of tax." (R. 2) This $13.83 was five per cent of the price of the motor cycle.

The motor cycle was purchased by the City of Westfield for police purposes, and was used at all times exclusively for those purposes. (R. 3.)

The Commissioner of Internal Revenue assessed a tax of $13.83 against the plaintiff company under the provisions of Subdivision 2 of Section 600 of the Revenue Act of 1924, which tax the plaintiff paid. (R. 3.) Subsequently, the plaintiff filed a claim for refund, setting out as a ground therefor that (R. 3)—

> * * * the regulations making taxable sales of motor-cycles to municipalities for use in performing their governmental functions are invalid and in contravention of the Federal Constitution.

The claim was disallowed by the Commissioner of Internal Revenue (R. 3, 4), and the plaintiff brought this suit to recover $13.83 with interest (R. 6–10).

PRELIMINARY STATEMENT

This case was heard by the Court of Claims in conjunction with the case of *Wheeler Lumber Bridge & Supply Company* v. *The United States*, 281 U. S. 572. After argument before that court, questions in respect to each of these cases were certified to this Court. In an opinion delivered May 7, 1929, following argument in both cases, this Court dismissed the certificates and remanded the cases for further proceedings, on the ground that the certificates were improper in that the answer to the question decided the case. On June 3, 1929, this Court withdrew its opinion. On May 26, 1930, this

Court rendered an opinion in *Wheeler Lumber Bridge & Supply Company* v. *The United States*, *supra*, holding that the question was properly certified, and on the same day set this case for reargument.

Upon the previous submission of this case the position of the Government was that the present case is governed by the decision of this Court in the *Panhandle Oil Co. case* (277 U. S. 218), and that accordingly the answer to the questions certified by the Court of Claims is that the transaction here involved is not taxable under Section 600 of the Revenue Act of 1924. (See Brief of the United States originally filed in this case.)

The Court having directed a reargument, we have ventured in this brief to emphasize the distinction between the incidence of the tax under consideration in the *Panhandle case* and the incidence of the tax here involved, and to argue that the *Panhandle case* must be limited to its own facts and that, thus limited, it does not govern the case at bar; and that, in any event, the effect of the tax upon the exercise of any governmental function is so remote and indirect as not to transcend the constitutional limitation upon the Federal power of taxation.

SUMMARY OF ARGUMENT

This case is distinguishable from the *Panhandle case*. There the incidence of the tax was the sale of the article. Here it is manufacture, production, or importation *and* sale.

The tax was not imposed upon the State, or upon any instrumentality of the State. It was imposed upon the manufacturer with respect to all sales of his products. In this case the manufacturer added the amount of the tax to his bill, but its payment by the City of Westfield was part of the bargain between the parties, and the tax was not in any sense imposed upon the City. Indeed, it may fairly be assumed that the transaction between the parties would have been precisely the same if the tax had been imposed upon the manufacturer of the motor cycle, regardless of its sale.

The manufacturer was not a public agent or instrumentality, and the principle that the Federal Government may not impose any tax on a State or a political subdivision thereof is not involved. The question is whether in taxing the manufacturer because of the sale to the City there has been a substantial invasion of the functions of government delegated to the municipality by the State.

A tax imposed generally upon the manufacture, production, or importation of articles is not unconstitutional when applied to articles ultimately sold to a State, and to impose a tax upon articles sold by the manufacturer, producer, or importer has no different effect so far as the purchaser is concerned. The effect of this tax upon the exercise of any governmental function was too remote and indirect to amount to an unconstitutional curtailment of the powers of the State.

ARGUMENT

I

THE TAX IN THE INSTANT CASE IS DISTINGUISHABLE FROM THE TAX IN THE PANHANDLE CASE. BOTH ARE EXCISE TAXES, BUT IN THE INSTANT CASE THE TAX IS IMPOSED ON THE PRIVILEGE OF MANUFACTURING AND THEREAFTER SELLING A MOTOR CYCLE; WHEREAS, IN THE PANHANDLE CASE, THE TAX WAS IMPOSED ON THE PRIVILEGE OF SALE ALONE

The tax reenacted by Section 600 of the Revenue Act of 1924 (*supra*, p. 2) is an excise tax imposed on the privilege of manufacturing, producing, or importing *and* selling the article specified. In the *Panhandle case* the Mississippi tax statute in question provided—

> Any person engaged in the business of distributor of gasoline, or retail dealer of gasoline, shall pay for the privilege of engaging in such business an excise tax of four cents (4¢) per gallon upon the sale of gasoline by such dealer in this state. No retail dealer shall be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer, nor shall the distributor pay such tax when the same is paid by the retailer. (Laws of Mississippi 1926, ch. 119, Sec. 1.)

The Mississippi tax was a tax upon the privilege of selling gasoline, and not upon the privilege of production, or production and sale. It was directed to the sale, whereas in the instant case the tax is imposed upon manufacture followed by sale, the occasion for its collection being the sale of the

manufactured article. Thus the incidence of the tax in the present case includes a transaction, namely, the manufacture of the finished article, to which the City was not a party and in which it was not concerned. In this respect there is a partial analogy to the tax on transportation had at the vendor's instance and as his means of getting his lumber to the place of sale and delivery, which was involved in *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572. There it was said (p. 579):

> The tax is not laid on the sale nor because of the sale. It is laid on the transportation and is measured by the transportation charges. True, it appears that here the transportation was had with a view to a definite sale; but the fact remains that the transportation was not part of the sale but preliminary to it and wholly the vendor's affair. *United States* v. *Normile,* 239 U. S. 344, 348. It follows that the tax on the transportation can not be regarded as a tax or burden on the sale. *Cornell* v. *Coyne,* 192 U. S. 418. As the tax is not laid on the sale or in any wise measured by it the case of the *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, referred to in the question and relied on by the plaintiff, is not in point.

In the case at bar the tax *is* laid on the manufacture *and* the sale, and is measured by the sale. So that the instant case lies between the *Panhandle Oil Co. case* and the *Wheeler Lumber Co. case,* and is distinguishable from both of these cases. Had the

tax been imposed upon manufacture alone, decision would have been controlled by the *Wheeler Lumber Co. case.* Had the tax been imposed upon the sale alone, the question would have been identical with that answered in the *Panhandle case.* If it be said that these distinctions are narrow and finely drawn, it may well be answered that the case at bar is quite as close to the *Wheeler Lumber Co. case* as it is to the *Panhandle case,* and that unless the doctrine of the *Panhandle case* is so broad as to extend the limitation upon the power of Congress there applied to a tax imposed upon the manufacture, production, or importation of articles, if the same is brought into operation and measured by the sale of such articles, the distinction is vital and controlling in this case.

II

THE TAX WAS NOT IMPOSED UPON THE STATE, OR UPON ANY INSTRUMENTALITY OF THE STATE. IT WAS IMPOSED UPON THE MANUFACTURER WITH RESPECT TO ALL SALES OF HIS PRODUCT

In this case the manufacturer added the amount of the tax to his bill, but its payment by the City of Westfield was part of the bargain between the parties, and the tax was not in any sense imposed on the City. *Lash's Products Co.* v. *United States,* 278 U. S. 175; *Snyder* v. *Bettman,* 190 U. S. 249. Indeed, it may fairly be assumed that the price paid by the City would have been precisely the same if the tax had been imposed on the manufacture of the motor cycle, regardless of its sale.

III

NOR WAS THE MANUFACTURER, UPON WHOM THE TAX WAS IMPOSED, AN AGENT OR EMPLOYEE OF THE STATE OR MUNICIPALITY

In its relationship to the City of Westfield the manufacturer was merely a vendor in an isolated transaction of sale. *Cf. Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514.

IV

THE EFFECT OF THIS TAX IMPOSED UPON THE MANUFACTURER WITH RESPECT TO ALL SALES OF HIS PRODUCT UPON THE EXERCISE OF ANY GOVERNMENTAL FUNCTION OF THE STATE WAS TOO REMOTE AND INDIRECT TO AMOUNT TO AN UNCONSTITUTIONAL CURTAILMENT OF THE POWERS OF THE STATE

Since the tax here concerned was not directly laid upon a State or upon any of its instrumentalities, the principle that the Federal Government may not impose any such tax is not involved. The question presented is whether in taxing the manufacturer because of the sale to the City there has been a substantial invasion of the functions of government delegated to the municipality by the State. In so far as taxes not directly laid upon a State or its instrumentalities are concerned, the limitation is not absolute and must receive a practical construction which permits both the National Government and the State Governments to exercise their individual functions without serious impairment or interference. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, *supra*. There is no express provision in the Constitution which guarantees to the several States

immunity from interference by the Federal Government in this respect. The principle of noninterference rests rather upon necessary implication from the relations of the States and the United States under the Constitution, and is essential to the preservation of a dual system of government. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Collector* v. *Day*, 11 Wall. 113; *Burnes National Bank* v. *Duncan*, 265 U. S. 17. But to extend this implied limitation too far is to defeat its very purpose by imposing unnecessary restrictions upon the sovereign power of taxation possessed by both the State and National Governments. And so distinctions must be carefully drawn, and their validity must be judged by the practical effect of the exercise of functions concededly possessed by one government upon the exercise of governmental functions concededly possessed by the other. The delicacy of balance in the application of this implied limitation upon the power of taxation is clearly shown in *Metcalf & Eddy* v. *Mitchell, supra*, where it was said (p. 523):

> Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum interference each with the other; and that limitation can not be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (*South Carolina* v. *United States*, 199 U. S. 437, 461; *Flint* v. *Stone Tracing Co.*, 220 U. S. 107, at 172) or the appropriate exercise

> of the functions of the government affected by it. (*Railroad Co.* v. *Peniston,* 18 Wall. 5, at 31.)

In *Snyder* v. *Bettman,* 190 U. S. 249, *supra,* where a Federal succession tax upon the transmission of property by legacy to a municipality was sustained, this Court said (pp. 253–254):

> Conceding fully that Congress has no power to impose a burden upon a State or its municipal corporations, the question in each case is whether the tax is direct or incidental.

Viewing the question in the light of the nature and extent of the burden imposed, the specification of the sale of his property as the occasion for the collection of a tax from a manufacturer can not properly be said to impose a direct burden upon the purchaser which under any practical construction of the limitation upon the power of taxation may be said to curtail the exercise of any governmental power, when the purchaser happens to be a State or the Nation. The burden and effect of such a tax, when judged in terms of practical effect, is quite as remote and indirect as was the transportation tax considered in the *Wheeler Lumber Co. case, supra.*

This Court and other Federal courts have held many activities and instrumentalities of the States to be subject to the burden of Federal taxation, where such taxation constituted only an indirect interference with the exercise by the States of their

governmental powers. There follows a partial list of cases in which such taxes have been sustained:

Tax on notes issued by bank operating under State franchise: *Veazie Bank* v. *Fenno,* 8 Wall. 533.

Tax on notes issued by municipality and used as money: *National Bank* v. *United States,* 101 U. S. 1.

Succession tax on transfer of property by will to municipality: *Snyder* v. *Bettman, supra.*

License tax on sale of intoxicating liquor by State: *South Carolina* v. *United States,* 199 U. S. 437.

Capital stock tax on bank owned and operated by a State: *State of North Dakota* v. *Olson* (C. C. A. 8th), 33 F. (2d) 848; appeal dismissed, 280 U. S. 528.

Taxes on incomes of consulting engineer, real-estate expert, sewer contractor, and attorney employed by State or municipality: *Metcalf & Eddy* v. *Mitchell, supra; Lyons* v. *Reinecke* (C. C. A. 7th), 10 F. (2d) 3; *Mesce* v. *United States,* 64 C. Cls. 481, certiorari denied, 278 U. S. 612; *Sackley* v. *United States,* 65 C. Cls. 304, certiorari denied, 278 U. S. 609; *Lucas* v. *Howard,* 280 U. S. 526, reversing (C. C. A. 5th) 29 F. (2d) 895; *Lucas* v. *Reed,* 281 U. S. 699, reversing (C. C. A. 3d) 34 F. (2d) 263; *Blair* v. *Byers* (C. C. A. 8th), 35 F. (2d) 326.

Consideration of the decisions of this Court, preceding and subsequent to the decision in the *Panhandle case,* we believe, warrants the conclusion that

that case has extended the implied constitutional limitation upon the governmental function of taxation to the very limit to which that limitation can properly be extended without defeating its own purpose; and we therefore respectfully submit that the doctrine of that case should not be held to govern the decision in this.

We are not unmindful that the foregoing argument is inconsistent with the brief for the Government filed upon the original submission of this case, but have felt justified in submitting this brief in view of the Court's direction that the case be reargued. The only doubt which we have in regard to the argument is whether the distinction urged is sufficient to escape the effect of the ruling of this Court in the *Panhandle case*. If it were not for that decision, we should not have the slightest hesitation in urging the Court to answer the question certified in the affirmative. We believe it should be so answered.

CONCLUSION

The question certified should be answered in the affirmative.

Respectfully submitted.

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Solicitor General.

CHARLES B. RUGG,
Assistant Attorney General.

FRED K. DYAR,
H. BRIAN HOLLAND,
Attorneys.

OCTOBER, 1930.

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IN THE

Supreme Court of the United States.

October Term, 1928.

No. ~~376~~. 45

INDIAN MOTOCYCLE COMPANY
v.
THE UNITED STATES OF AMERICA.

On Certificate from the Court of Claims.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE

JAMES S. Y. IVINS,
KINGMAN BREWSTER,
JOSEPH D. BRADY,
O. R. FOLSOM-JONES,
Amici Curiae.

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IN THE

Supreme Court of the United States.

October Term, 1928.

No. 576.

INDIAN MOTOCYCLE COMPANY
v.
THE UNITED STATES OF AMERICA

On Certificate from the Court of Claims.

MOTION FOR LEAVE TO FILE BRIEF and BRIEF OF AMICI CURIAE.

MOTION.

The undersigned, attorneys for several manufacturers of articles designated in Section 600 of the Revenue Act of 1924, who sold such articles to states and municipalities, paying the tax under said section, and who have pending claims for the refund thereof, respectfully move this Court for leave to file the subjoined brief as friends of the Court. Counsel for both parties have given their consent.

JAMES S. Y. IVINS,
KINGMAN BREWSTER,
JOSEPH D. BRADY,
O. R. FOLSOM-JONES.

BRIEF.

The Treasury Department ruled that under Section 600 of the Revenue Act of 1924, a tax of five per cent was payable by the manufacturer upon the sale of a motorcycle, even though the sale was to a political subdivision of a state. This construction of the statute—or the statute itself, if such construction be unavoidable—is unconstitutional.

That the burden of the tax would be passed on and borne by the purchaser was expected—see Report of Ways and Means Committee quoted on p. 7 of plaintiff's brief. cf. Revenue Act of 1918 Section 1312. That the tax actually was borne by the municipality is apparent from the fact that the standard price of the motorcycle was increased by the exact amount of the tax, which increased price was paid by the municipality.

In *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, this Court was divided five to four on the question whether an income tax was direct or indirect—but it was unanimous in holding that the United States could not impose an income tax upon the interest on municipal bonds. The prevailing opinion, following the reargument, per Mr. Chief Justice Fuller (158 U. S. 601, 630) says:

> "We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it can not be sustained, because it is a tax on the power of the states and on their instrumentalities to borrow money, and consequently repugnant to the constitution."

Possibly the burden of that tax on the municipalities was indirect, as was the burden of the Federal income tax on exports in *Peck & Co.* v. *Lowe*, 247 U. S. 165, or the burden of the state income tax on interstate commerce in *U. S. Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, and, it might not be possible exactly to measure the burden placed upon a municipality by a tax upon incomes generally. But, whether the burden was direct or indirect, it was held to be beyond the power of Congress to impose.

In the present case the burden upon the municipality was obviously direct (*Crewe Levick Co.* v. *Pennsylvania*, 245 U. S.

292), and its extent readily measurable. If the possibly indirect burden of the income tax of 1894 upon the borrowing power of the municipality rendered it unconstitutional, *a fortiori* the patently direct burden of the excise tax of 1924 upon the police power of the municipality renders it equally unconstitutional.

The fact that the tax is laid generally on all sales of automobiles, motorcycles, etc., does not justify it, any more than the generality of the income tax justifies its application to salaries of state officers (*Collector* v. *Day*, 11 Wall. 113) or of Federal judges (*Evans* v. *Gore*, 253 U. S. 245).

The collection of the tax was in violation of the Constitution. It should be refunded to the party from whom it was collected. Any adjustment between that party and the municipality is a matter for settlement between them according to the law that may be applicable.

The statute, to avoid the necessity of holding it unconstitutional, should be held not to have intended to tax sales to municipalities. The question certified by the Court of Claims should be answered in the negative.

Respectfully submitted,

JAMES S. Y. IVINS,
KINGMAN BREWSTER,
JOSEPH D. BRADY,
O. R. FOLSOM-JONES,
Amici Curiae.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1930.

No. 5

INDIAN MOTORCYCLE COMPANY

v.

THE UNITED STATES OF AMERICA

On Certificate from the Court of Claims.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE.

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IN THE

Supreme Court of the United States

October Term, 1930.

No. 5

INDIAN MOTORCYCLE COMPANY

v.

THE UNITED STATES OF AMERICA

On Certificate from the Court of Claims.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Comes now the undersigned and respectfully moves for leave to file the annexed brief for the Excelsior Motor Mfg. & Supply Company, as a friend of the Court. Counsel for both parties have consented to the filing of this brief.

The undersigned is counsel for the Excelsior Motor Manufacturing & Supply Company which manufactures the Excelsior Motorcycle, in its suit against the United States now pending in the Court of Claims (No. K 10, therein) which presents the same question presented in this case and in order that the Excelsior Company may be heard in the determination of its rights in said suit, it is desired to file this brief.

JOHN E. HUGHES.

IN THE

Supreme Court of the United States

October Term, 1930.

No. 5

INDIAN MOTORCYCLE COMPANY

v.

THE UNITED STATES OF AMERICA

On Certificate from the Court of Claims.

BRIEF OF AMICUS CURIAE ON BEHALF OF THE EXCELSIOR MOTOR MANUFACTURING & SUPPLY COMPANY.

PRELIMINARY STATEMENT.

May It Please the Court:

A decision of this case will be determinative of the same question presented to the Court of Claims in the case of the Excelsior Motor Manufacturing & Supply Company, in which the undersigned is counsel and the Court's permission to file this brief is greatly appreciated.

In the brief of the plaintiff there has appeared a statement on the grounds upon which the jurisdiction of this Court is invoked, the question certified, the statute involved and the facts of the case which need not be repeated here.

QUESTION PRESENTED.

The question presented in the case at bar is whether the Federal Government has power to impose an excise tax on sales to states and subdivisions of states.

SUMMARY OF ARGUMENT.

In this brief it will be argued that the Federal Government has not the power to impose a tax on sales to states or subdivisions thereof because "the power to tax involves the power to destroy", and if this power exists there are no limits to it and the Federal Government has the power to destroy the states.

It will be argued that the principle is firmly established that the states cannot tax the instrumentalities of the Federal Government and that the Federal Government cannot tax the instrumentalities of the states; that the rights of the state and the Federal Government to have their instrumentalities free from taxation by the other are equal and that the fact that the tax is, for convenience in collection, imposed upon and collected from the vendor is immaterial; that all sales tax must for convenience in collection be imposed upon and collected from the vendor but they are in reality paid by the consumer.

ARGUMENT.

This case in itself involving only $13.83 presents a great question of state rights.

However, the principles applicable to its solution have long been regarded as firmly established and their application to the question certified here compels a negative answer.

An affirmative answer to that question will be a departure from long established principles and place it in the power of the Federal Government to destroy the states.

As said by Chief Justice Marshall in *McCulloch v. the State of Maryland, et al., 4 Wheaton 316:*

"The power to tax involves the power to destroy". It is not a question of degree but of principle. If the existence of the power be conceded there are no limits to its exercise. "If the right to impose the tax exists it is a right which in its nature acknowledges no limts."

(Chief Justice Marshall in *Weston et al. v. the City Council of Charleston, 2 Pet. 449):* "If they may be taxed lightly, they may be taxed heavily; if justly, oppressively". *(United States v. Baltimore & Ohio Railroad Company, 17 Wall. 322.)*

If the Federal Government has the power to compel a state to pay a tax of 5% of the cost of a motorcycle, it has the power to exact a tax of 500% of this cost. If it can tax a manufacturer 5% on sales to a state, it can lay a tax so prohibitive that the manufacturer cannot

afford to sell to the state unless the state pays the tax. The tax can be made so great that the state cannot function and the Federal Government can raise all its revenue by taxing sales to the states and their subdivisions.

It is well established that the Federal Government cannot tax the instrumentalities of the States nor can the States tax the instrumentalities of the Federal Government.

In *Collector v. Day, 11 Wall. 113,* it was held that Congress did not have the power under the Constitution of the United States to impose a tax upon the salary of a judicial officer of a state. At pages 126 and 127 the Court said:

> "It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

Again it is said in that case:

> "The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power 'to lay and collect taxes' enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one

of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the states."

Again it is said in that case:

"The right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government stand upon as solid a ground, and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal Government officer in *Dobbins v. Erie Co. (16 Pet. 435)* from taxation by the state; for in this respect that is, in respect to the reserved powers, the state is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it, are necessarily, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in one case is as essential as in the other."

In *Pollock v. Farmers Loan and Trust Company, 158 U. S. 601,* in the opinion delivered after the re-argument of that case, the Court speaking through Chief Justice Fuller said, at page 637:

"We had unanimously held so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states and their instrumentalities to borrow money and consequently repugnant to the Constitution."

In *Ambrosini v. United States, 187 U. S. 1,* it was held that the Federal Government had no power to tax bonds furnished dram shop keepers in order to comply with the law of Illinois. The Court said at page 7:

"The granting of the license was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of state and municipal action on the subject, and assumes the power to suppress such action. And considering license and bond together, taxation of the bond involves the same consequences.

* * *

The general principle is that, as the means and the instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the states, so are those of the state exempt from taxation by the general government. It rests on the law of self-preservation for any government whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government exists only at the mercy of the latter. *Nelson J., the Collector v. Day, 11 Wall. 113, sub. nom. Buffington v. Day, 20 L. ed. 122.*"

In that case as in the case at bar the tax was imposed upon a citizen of the state and not on the state itself, but it was imposed by reason of a transaction with the state.

The rule being the same with respect to the rights of States to tax instrumentalities of the Federal Government. Decisions dealing with that right are pertinent.

In *Gillespie v. Oklahoma, 257 U. S. 501,* the Court speaking through Mr. Justice Holmes, held that a state could not impose a tax upon the net income of Mr. Gillespie, which he derived from sales of oil and gas received under leases of restricted Indian lands.

Oklahoma contended that its tax was upon its citizen, Mr. Gillespie, and that he was not an instrumentality of the Federal Government, just as it might be contended here that the tax was upon the Indian Motorcycle Company and it was not an instrumentality of the state government, but that contention did not prevail.

In the case of *Western Union Telegraph Company v. The State of Texas, 105 U. S. 560,* it was held that a state could not tax telegraph companies upon messages sent for the United States, and to the same effect is *Williams v. City of Talladega, 226 U. S. 404,* in which it was held that a license tax upon the privilege of sending telegraphic messages was invalid, since it made no exception in favor of messages sent for the United States.

In *Williams v. City of Talladega, 226 U. S. 404,* the Court said at page *419:*

> "We have, then, an ordinance which taxes, without exemption the privilege of carrying on a business, a part of which is that of a governmental agency constituted under a law of the United States and engaged in an essential part of the people's business—communication between the officers and departments of the Federal Government. The ordinance, making no exception of this class of business, necessarily includes its transaction within the privilege tax levied. This part of the license exacted necessarily affects the whole, and makes the tax unconstitutional and void."

In *A. G. Spalding & Brothers Co. v. Edwards, Collector, 262 U. S. 66,* it was held that export sales of baseballs and bats were not subject to tax under *Section 600 of the Revenue Act of 1917,* which section also taxed motorcycles. It was held that if these export sales were subject to tax they would violate the provision of the Constitution prohibiting a tax "on articles exported from any state".

The case of Panhandle Oil Company v. The State of Mississippi, 277 U. S. 218.

If the rule which prevents the states taxing the instrumentalities of the Federal Government is no broader than that which prevents the Federal Government taxing the instrumentalities of the states, then the case at bar is obviously governed by *Panhandle Oil Company v. Mississippi, 277 U. S. 218.*

It is respectfully submitted that this Court should be as vigilant in protecting the rights of the states from Federal aggression as it is in protecting the rights of the Federal Government from state aggression.

Assuming that the right of the states to be free from taxation by the Federal Government is as broad as that of the Federal Government to be free from taxation by the states, it is hard to reconcile the views in the dissenting opinion of Mr. Justice Holmes in the case of *Panhandle Oil Company v. Mississippi, 277 U. S. 218,* with the views expressed by him in *Gillespie v. Oklahoma, 257 U. S. 501.*

It is further respectfully submitted that "a government of laws and not of men" is more desirable than a government of men and that the Anglo-Saxon system which is based upon precedent is far more desirable than the system administered by the Mandarins of China under which each Mandarin does what he thinks to be right and it is further submitted that great constitutional principles ought not to change with the personnel of the Court which interprets them. In a time when respect for law is desirable it is submitted that it does not conduce to that respect to have constitutional principles change with the personnel of the Court. The thought here expressed is something far more important than this case.

The Argument for the Validity of the Tax.

The argument for the validity of the tax is contained in the opinion of former Attorney General Palmer, which states:

> "The tax is laid upon the manufacturer, and while it is probable that he will pass it on to the consumer, the tax itself is not laid upon the consumer. The burden therefore, if it falls upon the state, does so indirectly."

It may be further argued that the Federal Government has the right to tax income of corporations derived from casual sales to a state and it should therefore have the right to exact an excise tax on those sales.

An answer to this argument is that excise taxes on sales to the state although laid upon the vendor are in reality passed on to and paid by the state, while this is not true of income taxes.

Those who have studied the subject with a background of practical experience generally concede that the income tax is one tax which is not and cannot be successfully passed on to the consumer. The income tax is only upon profits and anything which comes out of profits does not enter into the cost of the articles sold. Prices of articles purchaseable on the open market are fixed by competition and cost.

The sales tax on the other hand is a tax which can easily be and is universally passed on to the consumer. When one buys a ticket for a play, the tax on the sale of the ticket is passed to the purchaser and the same is true with every other article on which there is a sales tax.

Congress knew that the tax involved here would be passed on to and paid by the purchaser (Report No. 1, 69th Congress, First Session).

The underlying economic theory of all sales taxes is that they are in reality imposed upon and paid by the consumer, although for convenience in collection they are payable by the vendor. For obvious reasons it would be inconvenient and economically impractical for the Government to attempt collection of $13.83 from every buyer of a motorcycle. If he forgot to pay it would cost more than $13.83 for a Revenue Agent to run him down and the force of clerks needed to handle a multitude of buyers' returns would be large and expensive. The same is true with respect to the taxes on sales of theatre tickets and on other articles. For these and other reasons sales taxes must in practice be collected from the buyers by the seller and the seller must be held accountable to the Government for the tax.

It is not improbable that the day will come when the Federal Government will derive most of its revenue from a sales tax instead of from an income tax. The sales tax has its proponents who refer to it as "as tax on spending" and "a tax on consumption". When that day comes must the states and cities pay tax to the Federal Government on everything they buy? Notwithstanding it was held in *Panhandle Oil Company v. Mississippi, 277 U. S. 218,* that they cannot lay a tax on what the Federal Government buys within their borders?

To say that the tax is laid upon the manufacturer and not upon the city is to sacrifice form to substance. In substance and effect the tax was upon the city and was paid in the case at bar by the city.

The question presented here was discussed but not decided in *American-LaFrance Fire Engine Co., Inc., v. Riordan, Collector, 6 F. (2d) 964.*

The broad principles laid down by the great Marshall which have for generations determined the constitutional law of our country ought not now to be departed from and in their place all laws tested by a rule of reason.

All of which is respectfully submitted.

JOHN E. HUGHES,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 5.—October Term, 1930.

Indian Motocycle Company,
vs.
The United States of America.

On Certificate from the Court of Claims.

[May 25, 1931.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a certificate from the Court of Claims. At a prior term the certificate was dismissed as not in accord with applicable rules and then reinstated, as in *Wheeler Lumber Bridge and Supply Co.* v. *United States*, 281 U. S. 572. It since has been amended, and further argument has been heard.

The facts disclosed in the certificate are: In 1925 the plaintiff, a corporate manufacturer of motorcycles in Massachusetts, sold a motorcycle of its manufacture to the City of Westfield, a municipal corporation of that Commonwealth, for use by the city in its police service. A tax in respect of the sale was assessed and collected from the plaintiff under § 600 of the Revenue Act of 1924, c. 234, 43 Stat. 322. After due but unsuccessful effort to have the same refunded, the plaintiff brought suit in the Court of Claims to recover the money so exacted from it—the tax being assailed as invalid, as it had been in the application for a refund, on the ground that it was imposed in contravention of the constitutional immunity of the State and her governmental agencies from federal taxation. The parties submitted an agreed statement showing the facts here recited, and the Court of Claims then certified to this Court the question (we state its substance), where a motorcycle is sold by its manufacturer to a municipal corporation of a State for use by such corporation in its police service, can the transaction be taxed under § 600 of the Revenue Act of 1924 consistently with the constitutional immunity of the State and her governmental agencies from federal taxation.

Our jurisdiction to entertain certificates from the Court of Claims, and the limitations on that jurisdiction, are explained in

Wheeler Lumber Bridge and Supply Co. v. *United States, supra.* The present certificate when tested by the rules there stated is unobjectionable. It presents a question of law suitably distinct and definite. And while, with the facts settled by an agreed statement accepted below, it is apparent that a decision of the question either way will be decisive of the case, this affords no ground for declining to entertain the certificate. *United States* v. *Mayer,* 235 U. S. 55, 66, and cases cited.

Section 600 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 332, is part of Title VI entitled Excise Taxes. The section provides that there "shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased". Motorcycles are among the articles enumerated and the applicable tax is five per centum of the price for which they are sold. Manufacturers, producers and importers are required severally to make returns of their sales and to pay the tax.

This taxing provision is a reenactment, with minor changes not material here, of a provision which was included in the Revenue Act of 1917, c. 63, § 600, 4 Stat. 300, 316, and repeated in succeeding enactments. It is now section 600 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 93; U. S. C. Title 26, § 881.

Both parties rightly regard the tax as an excise, and not a direct tax on the articles named. But they differ as to the transaction or act on which it is laid. Counsel for the plaintiff insist it is laid on the sale. Counsel for the government regard it as laid on manufacture, production or importation, or, in the alternative, on any one of these *and* the sale. We think it is laid on the sale, and on that alone. It is levied as of the time of sale and is measured according to the price obtained by the sale. It is not laid on all sales, but only on first or initial sales—those by the manufacturer, producer or importer. Subsequent sales, as where purchasers at first sales resell, are not taxed. Counsel for the government base their contention on the requirement that the tax be paid by "the manufacturer, producer or importer"; but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manu-

facture, production or importation. Importation, as such, already was otherwise taxed, c. 356, § 1, par. 369, 42 Stat. 858, 885, U. S. C., Title 19, § 121, par. 369, and in our opinion the words relied on fall short of expressing a purpose to subject it to a further tax.

This view of the tax is not new. The administrative bureau adopted it at the outset and has adhered to it up to the present time. The regulations issued under the Revenue Act of 1917 said on this point: "The tax is on the sale of the articles mentioned", 20 Tr. Dec. Int. Rev. 365; and this is repeated in the later regulations. 21 Tr. Dec. Int. Rev. 412; 23 Tr. Dec. Int. Rev. 68; 24 Tr. Dec. Int. Rev. 56; 26 Tr. Dec. Int. Rev. 592. Indeed, the tax is frequently spoken of in the regulations as a sales tax. And it is so described in reports of congressional committees dealing with revenue bills in which it was retained. Sen. Rep. No. 398, p. 40, 68th Cong., 1st Sess.; House Rep. No. 1, p. 16, 69th Cong., 1st Sess. While not controlling, this administrative and legislative action strengthens our conclusion, drawn from the taxing provision, that the tax is laid on the sale, and on that alone.

The cases of *Cornell* v. *Coyne*, 192 U. S. 418, and *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459, cited by counsel for the government, are not pertinent; for both related to taxes distinctly imposed on manufacturing.

With this understanding of the nature of the tax, we come to the question propounded in the certificate.

It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. *Collector* v. *Day*, 11 Wall. 113, 125, 127; *Willcutts* v. *Bunn*, 282 U. S. 216, 224-225. Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. *McCulloch* v. *Maryland*, 4 Wheat. 316, 430; *United States* v. *Baltimore and Ohio R. R. Co.*, 17 Wall. 322, 327; *Johnson* v.

Maryland, 254 U. S. 51, 55-56[1]; *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505; *Crandall* v. *Nevada*, 6 Wall. 35, 44-46.

Of course, the reasons underlying the principle mark the limits of its range. Thus as to persons or corporations which serve as agencies of government, national or state, and also have private property or engage on their own account in business for gain, it is well settled that the principle does not extend to their private property or private business, but only to their operations or acts as such agencies;[2] and, in harmony with this view, it also has been held where a State departs from her usual governmental functions and "engages in a business which is of a private nature" no immunity arises in respect of her own or her agents' operations in that business.[3] While these decisions show that the immunity does not extend to anything lying outside or beyond governmental functions and their exertion, other decisions to which we now shall refer show that it does extend to all that lies within that field.

It has been adjudged that bonds of the United States issued to raise money for governmental purposes, and the interest thereon, are immune from state taxation, because such a tax, even though inconsiderable in amount and imposed only on holders of the bonds, would burden the exercise by the United States of its power to borrow money. *Weston* v. *Charleston*, 2 Pet. 449, 468;[4] *The*

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[1]Respecting the immunity from state taxes this Court there said:

"With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since McCulloch v. Maryland, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today. Farmers & Mechanics Savings Bank v. Minnesota, 232 U. S. 516, 525, 526."

[2]Thomson v. Pacific Railroad, 9 Wall. 579, 591; Railroad Company v. Peniston, 18 Wall. 5, 34, 36-37; Central Pacific R. R. Co. v. California, 162 U. S. 91, 125, 126; Baltimore Ship Building and Dry Dock Company v. Baltimore, 195 U. S. 375, 382. Alward v. Johnson (decided February 24, 1931). And see McCulloch v. Maryland, supra, p. 436; Osborn v. Bank of United States, 9 Wheat. 738, 867; Clallam County v. United States, 263 U. S. 341, 345.

[3]South Carolina v. United States, 199 U. S. 437.

[4]This Court there said: "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government."

Banks v. *The Mayor*, 7 Wall. 16; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 513; *Northwestern Insurance Co.* v. *Wisconsin*, 275 U. S. 136, 140. And this immunity has been held to include bonds of a municipal corporation in a Territory issued to raise money for municipal purposes, the decision being put on the ground that such a corporation is an instrumentality of the United States exercising delegated governmental powers. *Farmers and Mechanics Savings Bank* v. *Minnesota*, 232 U. S. 516, 525. It also has been adjudged that bonds of municipal corporations in the several States issued to raise money for public municipal purposes, and the interest thereon, are immune from federal taxation, and this on the ground that such corporations are representatives of the States and exercise some of their powers, and that under the implications of the Constitution the governmental agencies and operations of the States have the same immunity from federal taxation that like agencies and operations of the United States have from taxation by the States. *Pollock* v. *Farmers Loan and Trust Co.*, 157 U. S. 429, 584-586, 601, 652, 653; s. c. 158 U. S. 601, 618, 693.

It has been further adjudged that the salary of an officer of the United States is immune from state taxation because the salary is the "means by which his services are procured and retained" and its taxation by a state would burden the exertion by the United States of powers belonging to the latter. *Dobbins* v. *Commissioner of Erie County*, 16 Pet. 435, 448, 449. And "for like reasons" it has been held that the salary of a state officer is immune from federal taxation. *Collector* v. *Day*, 11 Wall. 113, 124.

Other applications of the principle are shown in cases where it has been ruled that a state excise on the transmission of telegrams is void as to messages sent by officers of the United States on public business, because the excise, although exacted only of the telegraph company, is, so far as it is based on the government messages, a tax on the means employed by the United States in carrying its constitutional powers into effect, *Western Union Telegraph Co.* v. *Texas*, 105 U. S. 460, 466; *Williams* v. *Talladega*, 226 U. S. 404, 418-419; and that bonds exacted by a municipal corporation of a State as a condition to granting licenses the issue of which is committed by the state to such corporation cannot be taxed by the United States, even though the tax be collected only from the

licensees, because such a tax would burden the exercise of a function belonging to the State and city in their governmental capacity, *Ambrosini* v. *United States*, 187 U. S. 1, 8.

In *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, this Court was called upon to determine whether a state excise laid on the sale of gasoline, and collected only from the dealer making the sale, could be applied to sales to the United States for the use of its coast guard fleet and its veterans' hospital, and the ruling, made after much consideration, was that the excise could not be so applied consistently with the constitutional principle. The Court there held that while a State may impose a tax on a dealer "for the privilege of carrying on trade that is subject to the power of the State", she may not lay any tax on sales to the United States by which it "secures the things desired for its governmental purposes", and further:

"It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. . . . . To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. (Citing cases.) And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State."

We think it follows from these decisions, particularly from the one last cited, that the sale of motorcycles to a state agency, such as a municipal corporation, for use in its police service is not subject to taxation by the United States. The maintenance of a police service by such a state agency, like the maintenance of a coast guard service by the United States, is a governmental function; and that function extends—in one instance as much as in the other—to the purchase of equipment and supplies needed to render the particular service efficient. Under the constitutional principle the exertion of such a function by a State or a state agency has the same immunity from federal taxation that like exertions by the United States or its agencies have from state taxation. Here the tax is laid directly on the sale to a governmental state agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which the United States cannot tax consistently with the constitutional principle.

The decisions in *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 526; *Wheeler Lumber Bridge and Supply Co.* v. *United States*, 281 U. S. 572, 579; and *Willcuts* v. *Bunn*, 282 U. S. 216, 225 *et seq.*, cited by counsel for the government, are all distinguishable, for the taxes there in question were not laid on transactions involving an exertion of governmental functions and their bearing on governmental operations was so indirect or remote as to place them outside the principle which is applicable here.

The question propounded in the certificate is answered in the negative.

Mr. Justice HOLMES regards *Panhandle Oil Co.* v. *Knox* as controlling in principle and upon that ground acquiesces in this decision.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 5.—October Term, 1930.

Indian Motocycle Company,
vs.
United States.

On Certificate from the Court of Claims.

[May 25, 1931.]

Dissenting opinion of Mr. Justice Stone.

I think the question should be answered in the affirmative. The implied immunity of one government, either national or state, from taxation by the other should not be enlarged. Immunity of the one necessarily involves curtailment of the other's sovereign power to tax. The practical effect of enlargement is commonly to relieve individuals from a tax, at the expense of the government imposing it, without substantial benefit to the government for whose theoretical advantage the immunity is invoked. Compare *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 522-4; *South Carolina* v. *United States,* 199 U. S. 437, 455; *Railroad Company* v. *Peniston,* 18 Wall. 5, 30-31; see also *Missouri* v. *Gehner,* 281 U. S. 313, 323; *Macallen Company* v. *Massachusetts,* 279 U. S. 620, 637.

This is especially the case where, as here, the sole ground of the immunity is that, although the tax is an excise collected by one government from an individual normally subject to it, the incidence of the tax may conceivably be shifted to the other government. In such a case it is not clear how a recovery by the taxpayer would benefit directly the government supposed to be burdened; and the assumption of indirect benefit in the case of a tax of this type necessarily rests upon speculation rather than reality. See *Lash's Products Co.* v. *United States,* 278 U. S. 175. It is significant that neither the federal nor any state government has appeared by intervention or otherwise to support this claim of immunity in cases in which the taxpayer has urged it upon us.

The court has many times held, as recently as in *Educational Films Corporation* v. *Ward,* 282 U. S. 379, that an excise tax,

imposed directly on the individual, is not invalid because indirectly it may burden either the state or the national government. See also *Willcuts* v. *Bunn*, 282 U. S. 216, 225; *Denman* v. *Slayton*, 282 U. S. 514. A bequest to the United States or a state may be subjected to an inheritance tax by the other, *United States* v. *Perkins*, 163 U. S. 625; *Snyder* v. *Bettman*, 190 U. S. 249; see *Greiner* v. *Lewellyn*, 258 U. S. 384, although the consequent indirect burden is apparent. Even if it could be said that there is some reason, which the Court has never attempted to state, for the distinction which was made by the decision in *Panhandle Oil Company* v. *Mississippi*, 277 U. S. 218, between an excise on sales to a government and one on legacies, the fact of the shifting of the burden would seem to be at least less apparent in the case of a sale.

In the *Panhandle Oil* case, it was held that this shifting of the burden of a state tax from the seller to the buyer was sufficient to render the tax invalid where the buyer was an agency of the United States, and it was assumed that the burden of the sales tax involved was so inevitably passed on to the buyer as to require this result. With this assumption economists would not, I believe, generally agree. Many hold that whether the burden of any tax paid by the seller is actually passed on to the buyer depends upon considerations so various and complex as to preclude the assumption *a priori* that any particular tax at any particular time is passed on.[1] In some conditions of the market, the burden remains with the seller, or even may be shifted back from the seller to the pro-

[1] Bastable, Public Finance (3rd ed.) pp. 372-377, 387-388, 548, 577-578, 588; Brown, The Economics of Taxation, pp. 95-96, 134-135, 326-328; Bye and Hewitt, Applied Economics, pp. 453-456; Ely, Outlines of Economics (5th ed.) p. 794; Hobson, Taxation in the New State, pp. 52-56; Lutz, Public Finance, pp. 317-319; Marshall, Principles of Economics, (6th ed.) pp. 413-415; Nicholson, Elements of Political Economy, pp. 456-460; Seligman, Shifting and Incidence of Taxation, (5th ed.) pp. 218-219, 253-254; Shoup, The Sales Tax in France, pp. 322-327; Proceedings, National Tax Association, 1907, p. 432; *id.*, 1920, p. 175-176, 179, 212, 266; *id.*, 1922, pp. 108-109; *id.*, 1923, pp. 297-298; *id.*, 1924, pp. 307, 314, 347-349, 354, 355; *id.*, 1929, pp. 271, 406-407; Bulletin, National Tax Association, 1923-1924, p. 170; *id.*, 1929-1930, p. 260; National Industrial Conference Board, General Sales or Turnover Taxation, pp. 52-54. Others, without discussion of those factors which affect and often obscure the fact of shifting, hold the contrary: Comstock, Taxation in the Modern State, p. 121; Bulletin, National Tax Association, 1923-1924, p. 174.

ducer by the reduction of the producer's price, rather than forward to the consumer by an increase of the seller's price.[2]

Whatever factors determine whether the burden does in fact shift, I do not think it can be said that a tax paid by the seller in any given case necessarily burdens the purchaser either more or less, because in form laid on the sale, as in the *Panhandle Oil* case, or upon transportation of goods sold f. o. b. destination, as in *Wheeler Lumber Company* v. *United States*, 281 U. S. 572, or on manufacture alone of articles intended for sale, see *Correll* v. *Coyne*, 192 U. S. 418, or on both manufacture and sale.

These considerations are, to me, persuasive that the broad rule announced in the *Panhandle Oil* case ought not to be extended, even if we were not required by our own decisions to limit it; and that we ought not to strain the words of the statute to bring this case within the authority of that one. It seems to be conceded that if the tax in the present case were levied on manufacture alone, we would be bound to hold it valid, *Correll* v. *Coyne, supra;* see *Lash's Products Co.* v. *United States, supra.*

The rule of the *Panhandle Oil* case has been limited in *Wheeler Lumber Co.* v. *United States, supra*, holding that a tax on transportation, which in that case was necessary to effect delivery by the seller, was valid because not in terms a tax on the sale, as it was in the former. Even if verbal distinction, unfounded in economic realities, must be made between the two cases so that both may stand as authoritative expositions of the Constitution, considerations of substance rather than of form should lead us to choose that one which would restrict the doctrine of the *Panhandle Oil* case to the tax imposed in unqualified terms on sales to which it was applied in that case. The present tax is not levied in such terms, exclusively on sales, but is effective only when the seller both manufactures or imports and sells. With respect to the incidence of its burden on the buyer, so far as we can know, it does not differ from a tax on the manufacture of goods, payable when sold. See *Lash's Products Co.* v. *United States, supra.* I think that the *Wheeler Lumber* case, rather than the *Panhandle Oil* case, should control in determining its validity.

Mr. Justice BRANDEIS concurs in this opinion.

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[2]Bastable, pp. 376, 548; Brown, p. 96; Lutz, p. 319; Hobson, p. 54; Marshall, pp. 413-414; all supra Note 1; Bulletin, National Tax Association, 1923-1924, p. 170.